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WISCONSIN REPORTS

III

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JUNE 20 — NOVEMBER 5, 1901.

FREDERIC K. CONOVER
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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 109.

Page 735. For 1895, ch. 164, subch. IV, sec. 5 . . 614, read 1885, ch. 164, subch. IV, sec. 5 . . 614.

VOL. 110.

Page 667, lines 11–16. Read as follows:

For the appellant there were briefs signed by *P. H. Martin*, of counsel, and oral argument by *Mr. Martin* and *Mr. D. G. Classon*.

For the respondent there was a brief by *Hoyt & Olwell*, attorneys, and *H. O. Fairchild*, of counsel, and oral argument by *Mr. F. M. Hoyt* and *Mr. Fairchild*.

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IN MEMORIAM.

DEATH OF A. R. R. BUTLER.

On the 20th day of June, 1901, Gen. F. C. Winkler of Milwaukee addressed the court as follows:

May it please the Court:—Mr. A. R. R. BUTLER, a member of the Wisconsin bar from an early day, died at his home in Milwaukee on the 4th of April, 1901, at the age of nearly eighty years; and I have been commissioned by the Milwaukee Bar Association, in view of his exceptional prominence as a lawyer, to present to this court a memorial address adopted by that body upon his decease. The circumstance that I was for a number of years associated with him as a partner is my excuse for adding a few words of personal tribute.

Mr. BUTLER was possessed of qualities which made him a marked man in his profession. He was well read in the law, although it cannot be said that he was an exceptionally learned lawyer. He was an effective advocate, but without exuberance of speech or attempts at rhetorical adornment. He was candid and open, earnest and ardent. A glow of conviction suffused his arguments. Sound judgment and a happy tact governed his actions. His methods were thorough and painstaking. There was no end to his laborious preparation for an important trial. Hence when he came into court he was at his ease—master of the situation.

These qualities, with a fine presence, a dignified bearing, attractive manners, and a pleasing voice, combined to make him the able and accomplished trial lawyer that he was. His language was simple but earnest and strong, and I have seen him in the climax of his arguments rise to powerful, dramatic effects.

In early life, while district attorney of Milwaukee county, it fell to his lot to prosecute a number of highly important and exciting criminal cases, in which the whole community took an interest. They established his fame as a criminal lawyer, and throughout the period of his practice his services were frequently called into requisition in important criminal trials in different parts of the state, and on one or two occasions far beyond its boundaries. Yet he was by no means a "criminal lawyer" in the ordinary sense of the word. His practice was chiefly in the civil courts.

Among his associates at the bar he was held in the highest esteem.

He had a devoted love for and took great pride in his profession. Quiet in manner and retiring by habit, he was in no sense a pushing man. He never sought preferment. He never sought a law suit. But when engaged in a juridical contest, all his energies seemed to arouse themselves, and he wielded his weapons with telling force. Thus he came to take rank with the foremost practitioners of his day.

But I must not farther forestall the address I am to present:

Memorial of the Milwaukee Bar Association.

To the Bar Association of the County of Milwaukee: The committee appointed to prepare a memorial upon the death of our deceased brother, A. R. R. BUTLER, beg leave to report the following and recommend that it be adopted and spread upon the records of the association.

AMMI R. R. BUTLER was born in Vermont, September 4th, 1821. In 1822 his father, a prominent physician, removed to Alexander in Genesee county, New York, where the son, after a thorough academic education, began the study of the law. He completed his studies in Buffalo, New York, and there secured his admission to the bar in the year 1846. In the fall of that year, at the age of twenty-five, he entered upon the practice of his profession in Milwaukee, Wisconsin, which then became his permanent home. His exemplary personal character and superior professional ability were very soon recognized and won for him the honor of election as the first district attorney of Milwaukee county after the admission of Wisconsin into the Union as a state. He was twice re-elected, and served in this important office until January 1, 1855, when he retired and devoted himself to the general practice of his profession.

As district attorney he was engaged in several causes of great importance and difficulty, in association with or opposition to lawyers of the highest skill and eminence, and always acquitted himself with honor. When he retired from office he had become widely known as a lawyer, and had established an excellent reputation for ability, thoroughness, and efficiency in the discharge of professional duty. Giving himself with ardor and with singleness of aim to his profession, and deaf to the allurements of political office, Mr. BUTLER soon gained a large and lucrative civil practice. His only public service after his term of six years as district attorney was rendered as a member of the Assembly of the state in 1866, and as mayor of the city of Milwaukee in 1876 and 1877. He was elected to the mayoralty without opposition, and accepted the office with reluctance. He retired from active practice about the year 1874 with a competence secured by prudent investments and by frugal living.

While engaged in active practice he was frequently urged by eminent

Death of A. R. R. Butler.

members of the bar to accept judicial office—on one or two occasions that of chief justice of the supreme court of the state,—but he declined the proposed honors, preferring his position as a practicing lawyer to any official station, however high.

For several years he was president of the bar association of Milwaukee county, and he was esteemed by his associates at the bar and by his fellow-citizens as a man in the front rank of the profession, the peer of any man in that group of eminent lawyers who gave distinction to the bar of this county during the first twenty years of the life of Wisconsin as a state.

Mr. BUTLER was a man of commanding presence, of dignified bearing, rather reserved though courteous in manner, and of exemplary personal character. As a lawyer he was careful, conscientious, and thorough in investigation and counsel, and forcible and eloquent in his addresses to court and jury, while his great earnestness, evident sincerity, and impressive manner commanded the close and sympathetic attention of both court and jury and contributed greatly to his success. In all his relations, public, professional, and private, he maintained the character of an upright and conscientious officer, an able, learned, and distinguished lawyer, and a high-minded and exemplary citizen.

A distinguished member of this bar who knew Mr. BUTLER intimately, in a recent sketch of his life and character, paid him the following just tribute:

"It has been truly stated that the 'fame of the advocate is ephemeral, fading with the memories of those who heard him. We write the record of our lives upon the sand; the incoming tide of a succeeding generation blots out the record forever.' And so it must be with respect to Mr. BUTLER'S fame. The masterful pleas addressed by him to the court and jury during his thirty years of active professional life have unfortunately failed of permanent record, except as briefly noted in the reports of the supreme court of the state. His wonderful magnetic power in delivery, his intensity of conviction in the justice of the cause he represented, the forceful presentation of his propositions, and the dramatic fervor with which he pressed them home to conviction upon the minds of court and jury, are retained only in the fading memories of his few surviving contemporaries and of those—now past middle life—who sat at the feet of this legal Gamaliel to drink in inspiration of their profession. But perhaps better and more during than such exhibitions of masterful power of advocacy is the example of his professional life with respect to the ethics of his profession. He relied not upon the inspiration of the moment. He made ready his cause with thoroughness and thoughtfulness, sparing neither time nor labor in its preparation. He was self-contained, self-reliant, never taken unawares.

He passed his word of promise with slow and cautious deliberation; but the promise, once given, was inviolable. He looked for success—and he looked not in vain—in the ability to perform and in the conscientious performance of the professional duty committed to him. He deprecated the more recent methods of securing practice which intense competition has introduced, as undignified and unprofessional, tending to lower the noble profession of the law to a mere trade or business. He presents to us a bright example of a noble, able, learned lawyer and eloquent advocate, entertaining and illustrating in his professional life those old-fashioned traits of honor and decorum which unhappily in present professional life seem to have lost some of their potency. In private life he was the kindly, courteous, considerate, Christian gentleman, commanding the respect, the esteem, and the love of his acquaintances."

Few of the professional associates of Mr. BUTLER during the period of his active career at the bar survive him. It is well that those who are now occupied with the duties and responsibilities of professional life, which he discharged so earnestly and with such fidelity to professional duty, should consider and emulate the example of one who held the profession of the law in high honor and ever maintained its dignity inviolate.

JOSHUA STARK, Chairman,
E. MARINER,
ALFRED L. CARY,
G. W. HAZELTON,
Committee.

On behalf of the court, Mr. Chief Justice CASSODAY responded as follows:

It is generally conceded that among the lawyers who located in this state prior to its admission into the Union there were some of the brightest intellects our profession has produced. As I look back upon them with the mind's eye, as they appeared to me when I entered the state forty-four years ago, they seem to have been composed largely of intellectual giants. In that company of able men Mr. BUTLER occupied a very conspicuous place. Those who remain and who met him as an opponent in the trial of causes will never forget the impressions he made. With a commanding figure, a dignified bearing, a clear comprehension of his case and the strong and weak points involved, with a frankness and a fairness which no one could rightfully question, with a magnanimity toward opponents which was quite sure to secure the good-will of all, with a sincerity of purpose which generally accompanies strong conviction, Mr. BUTLER, with his wonderfully bold and magnetic powers, was the peer of any who met him in the trial of causes.

Death of A. R. R. Butler.

As to those finer and more delicate qualities of head and heart which are only appreciated after close, intimate social and personal intercourse, you, sir, are peculiarly fitted to testify, and certainly all who knew him will readily accept the very generous statement made. Twenty-seven years of retirement from the practice of his profession has, necessarily, very much narrowed the circle of his personal acquaintances and dimmed the memory of those who remain; but his many manly qualities of head and heart should be held in sacred memory by all those who are now at the bar, and continue as an inspiration to our noble profession for all coming time.

These proceedings will be entered in the records of the court and published in the Reports.

CASES DETERMINED

AT THE

January Term, 1901.

FIRST AVENUE LAND COMPANY, Appellant, vs. PARKER, Respondent.

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April 30 — June 20, 1901.

Corporations: Illegal issue of stock: Estoppel: Breach of officer's bond: Damage to corporation: Pleading: Liability for deceit.

1. Corporate stock issued without consideration, in violation of sec. 1753, Stats. 1898, is void even in the hands of innocent purchasers to whom new certificates have been issued, and no estoppel of the corporation gives to such purchasers the rights of stockholders. In an action by the corporation upon the bond of its officer who wrongfully issued such stock there can be no recovery, therefore, on the ground that such issue damaged the corporation by the creation of stockholders' rights.
2. Such official misconduct may, however, have cast upon the corporation a liability for damages in an action for deceit based on the false declarations contained in the stock certificate. But in the action on the official bond it must at least be shown that such liability exists, by allegations that the purchasers of the certificates relied upon the declarations therein and were ignorant of their falsity and free from negligence. [Whether an action could be maintained on the official bond for a breach thereof which had resulted merely in the creation of a liability, before the plaintiff corporation had actually been compelled to pay anything thereon, not determined.]

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

The complaint alleged incorporation of the plaintiff; that on November 12, 1891, E. L. Babcock, since deceased, was duly elected secretary, and that he gave, and the defendant *George F. Parker*, as surety, executed, a bond conditioned that he should pay and account for all moneys, securities, and property coming into his hands as secretary, and well and truly perform all the duties of his office and trust as such secretary; that by the articles of association and by-laws it was the duty of the secretary to sign, with the president, all certificates of stock, and to issue and deliver the same to the several subscribers on payment of the several subscriptions, and not otherwise; that said E. L. Babcock subscribed for 500 shares of $10 each, and that one Charles Wilhelm subscribed for a like amount, thereby agreeing to pay the sum of $1,000 in cash, the time of payment of the balance not being specified; that among Babcock's duties was, as secretary, to collect and pay over to the treasurer the full amount of the cash payments due from Wilhelm and himself upon their stock subscriptions, before issuing or delivering said stock to either of them; that at the first meeting of the stockholders it was provided and agreed that the first twenty per cent. of each subscription should be paid in cash at the date of such meeting, to apply upon the purchase price of a tract of land, and that certificates of paid-up stock should be issued to each of the subscribers to the amount of their several cash payments; that said E. L. Babcock, as secretary, unlawfully combining with the president, also now deceased, caused to be issued to himself thereafter 100 shares of paid-up stock in said corporation without consideration, and without making the said cash payment of $1,000 or paying any other sum; and subsequent to such issue, he, during his lifetime, conveyed the same to Hattie E. Babcock and J. M. Babcock for value, who now claim to be the holders and owners thereof free from all equities or rights of the plaintiff; and also, in like combination, issued

a certificate for 100 shares of the paid-up capital stock to said Wilhelm without the payment of any consideration therefor, and without the making of any part payment, which said Wilhelm transferred for value to one William Yewdale, who has ever since held the same, and claims to be, and, as plaintiff believes, is, the *bona fide* holder thereof for full value; that thereafter said assignees of stock presented their certificates, duly assigned, which thereupon were canceled, and new certificates issued therefor by the said president and the said Babcock, as secretary, in due form, purporting on their face to be fully paid and nonassessable, and were delivered by said Babcock to said transferees, who ever since have held the same, claiming title thereto and interest in the property and assets of the plaintiff corporation, free from all infirmity or illegality; that Wilhelm has no property and is insolvent, and that Babcock died in the year 1894, leaving no estate whatever, and insolvent; that the other surety to the bond died in March, 1894; that by reason of the premises the plaintiff has suffered damages in the sum of $2,000, together with interest from the 26th day of December, 1891, for recovery of which the complaint prays.

A general demurrer to this complaint was sustained, from which action the plaintiff appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence.* They cited *Bank v. Lanier*, 11 Wall. 377; 1 Cook, Corporations, § 417; *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 43 L. R. A. 777; 2 Thompson, Corporations, § 1680; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Steacy v. L. R. & Ft. S. R. Co.* 5 Dill. 348; *Foreman v. Bigelow*, 4 Cliff. 543; *Re British Farmers' P. L. C. Co.* (*Nichols' Case*), 26 Weekly Rep. 334; *Bridgeport Bank v. N. Y. & N. H. R. Co.* 30 Conn. 231; *Mandlebaum v. North American M. Co.* 4 Mich. 465; *Rood v. Whorton*, 67 Fed. Rep. 436; *Young v. Erie I. Co.* 65 Mich.

111, 125; *Western Bank v. Tallman*, 17 Wis. 533; *Nat. Bank v. Watertown Bank*, 105 U. S. 222; *Herdegen v. Cotzhausen*, 70 Wis. 590; *Wood v. Union G. C. B. Asso.* 63 Wis. 9.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders.*

DODGE, J. The case presented by this complaint is a very simple one, and not in accord with the situation discussed in *First Ave. L. Co. v. Hildebrand*, 103 Wis. 530, of which we are told that this is a sequel. As now before us, it merely appears that there were issued two certificates of stock, each for $5,000 par value, without any consideration; that is, neither for money, nor for labor or property, actually received by the corporation, equal to the par value thereof, as required by sec. 1753, Stats. 1898. This being so, no reason is apparent upon which to escape the further provisions of the same section that "all stocks and bonds issued contrary to the provisions of this section shall be void." Indeed, counsel for appellant concedes effective applicability of that section to the stock originally issued, but contends that, certificates of stock having been issued by the corporation asserting the ownership of stock by the parties named, upon due consideration therefor, the corporation is estopped to deny, as against one innocently purchasing such stock in reliance upon the facts so certified to be true, that the persons named did own such shares of stock. As a result of this estoppel, he contends that the innocent purchasers have become entitled to the same rights as if the certificates were true, namely, to a share in the ownership of the corporation itself, and all other rights incident to the actual ownership of stock. This is the damage to the corporation claimed to have resulted from Babcock's breach of his official duty. It is, of course, obvious that, if this position is sound to its full extent, sec. 1753 is very much emasculated, for that doctrine

would give practical validity to stock which the statute declares shall be void. It would likewise give practical existence and validity to stock beyond the power of the corporation. Certificates issued and passed to innocent holders would give to them the right to hold stockholders' meetings, of which they might constitute a majority, to control the affairs of the company, and to share with the owners of actual capital in distribution of dividends or assets. A corporation limited by its charter to $100,000 of stock might thus have outstanding rights in individuals to represent twice that volume.

As already stated, appellant plants his contention on the doctrine of estoppel, and cites numerous authorities asserting applicability of that doctrine to corporations in issuing certificates of stock. The cases cited present several phases of the effect of the doctrine. Thus courts have refused affirmative relief by way of cancellation of outstanding certificates improperly issued but held in good faith and for value (*Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Manhattan B. Co. v. Harned*, 27 Fed. Rep. 484; *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351); also by way of compelling payment of unpaid subscription or assessments where certificates falsely declared stock full paid (*Steacy v. L. R. & Ft. S. R. Co.* 5 Dill. 348, 372; *Rood v. Whorton*, 67 Fed. Rep. 434; *Re British Farmers' P. L. C. Co.* 26 Weekly Rep. 334). In other cases the false certification of stock has been held to support action for damages on the ground of fraud. *Holbrook v. N. J. Z. Co.* 57 N. Y. 616; *Shaw v. Port Philip & C. G. M. Co.* 13 Q. B. Div. 103. In one case the supreme court of Michigan held the holder of a certificate issued upon a forged transfer of valid stock entitled to the rights of a stockholder, but based its decision on a peculiarly drastic statute of that state. *Mandlebaum v. North American M. Co.* 4 Mich. 465.

We are not inclined to dispute the propositions that, when

the officers of a corporation act within the scope of their powers, the corporation acts, nor that, subject to inherent distinctions between artificial and natural persons, a corporation may be estopped by its acts as effectively as may a natural person. But neither legal rules nor legal fictions can overcome physical facts nor laws of nature. Closing the mouth of a party to deny will not create what cannot exist. The estoppel, however complete, against one who makes two conveyances of the same piece of land, cannot transpose it into two pieces; and that impossibility must be recognized by courts in the practical application of the estoppel and adjustment of rights. Hence it is not surprising that all courts, in applying to corporations estoppel to deny the assertions of their certificates, have stopped short of holding that thereby could be created capital stock which, under the law, could not have existence. Counsel for appellant concedes such limit in the case of attempted overissue of stock, recognizing that when all of the capital stock possible of existence under the law has been issued no more can come into being by any process. A corporation capable of only 1,000 shares of capital stock cannot, by estoppel, be transformed into one of 2,000. "Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void." Cook, Corporations, § 292. "Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. . . . His [the purchaser's] certificate is so much waste paper, and he is not a stockholder." Id. § 426. This principle that estoppel cannot create capital stock which the law does not permit to exist is conclusive, under our statute, *supra*, against appellant's contention that by the official misconduct of the secretary in issuing full-paid certificates without any payment in fact the corporation has been damaged by the creation of stockholders' rights in those who hold such certificates or reissues in place of them. No such rights have been

created, for by sec. 1753, Stats. 1898, such stock is "void." That statute, as this court has heretofore said, was a "declaration of a public policy." *Clarke v. Lincoln L. Co.* 59 Wis. 655, 660. It asserts the legislative will that those otherwise dealing with corporations shall be protected, rather than those dealing in stock certificates. To effectuate that legislative purpose, the law must be enforced as it is written, and the prohibited issues of stock must be held void as stock, although those procuring such unlawful issues may often be held liable to pay therefor. *Jenkins v. Bradley*, 104 Wis. 540; *Shaw v. Gilbert, post*, p. 165. Attempts by the corporation to issue stock in defiance of this statute are as completely ineffective as attempts to issue in excess of the total authorized by law or charter.

It thus appearing that the corporation has not suffered the damage pointed out and principally insisted on by appellant, it remains to be considered whether any other damage to it appears with reasonable certainty from the allegations of the complaint. There is a suggestion that in some way the corporation has lost its opportunity to collect from those who subscribed for this stock by reason of the wrongful delivery of the certificates, followed by their transfer and issue of new certificates to others. No such loss is apparent. The liability of Babcock and Wilhelm upon their respective subscriptions was not thereby impaired, and there is no allegation that the solvency or collectibility of either of them diminished subsequently to the stock issue, if that fact were in any wise material. We can discover no damage in that connection resulting from the secretary's acts. There is, however, a possible injury to the corporation, which may result from the issue and transfer of the void certificates by the officers having general power and authority to issue certificates of capital stock, so that their acts, whether valid or invalid, must be deemed to be the acts of the corporation itself. The consensus of decision is well-

nigh uniform to the effect that, although such certificates cannot create stock or stockholding beyond that authorized by law, they do constitute declarations of fact of the most solemn and unambiguous character, reliance upon which in the community is to be expected; and that the corporation must respond in the only way it can to protect from loss those who innocently and without negligence act in reliance on the truth of such declarations. While the corporation, by reason of its legal limitations, cannot make good the false certificate of existence and ownership of stock, it can respond in money to reimburse any damages actually suffered by those who rely on the facts so certified. We find its liability so to do declared with great unanimity. Cook, Corp. § 293, says:

"Although it is settled law that overissued stock is void and valueless, and that no action lies either to compel the corporation to recognize the holder as a stockholder, or to issue in place thereof a valid certificate, yet where overissued certificates of stock, signed or purporting to be signed by the corporate officers having the authority to issue stock, and actually issued by such officers, are purchased by any person, or are taken in any manner in good faith and for value, such *bona fide* holder may sue the corporation in tort and recover damages."

Some of the more important cases supporting this view are the following: *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Ky. v. Schuylkill Bank*, 1 Pars. Eq. Cas. 180; *People's Bank v. Kurtz*, 99 Pa. St. 344; *Kisterbock's Appeal*, 127 Pa. St. 601; *Holbrook v. N. J. Z. Co.* 57 N. Y. 616; *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351; *Bridgeport Bank v. N. Y. & N. H. R. Co.* 30 Conn. 231; *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. F. R. Co.* 137 N. Y. 231, 19 L. R. A. 331, note; *Moores v. Citizens' Nat. Bank*, 111 U. S. 156; *Allen v. South Boston R. Co.* 150 Mass. 200. The result of the view above stated is that by the secretary's breach of

his official duty there may be cast upon the corporation a liability for damages. That action is founded on the fraud accomplished by the false declarations in the certificate. To the existence of such liability, however, are necessary all the elements of the usual action for deceit. Of those elements the false representation is supplied by the certificate itself, but, in addition, it is necessary that the person making demand shall have relied thereon and shall have been ignorant of the falsity of the statements and free from any want of ordinary care and diligence. *Shaw v. Gilbert, post*, p. 165; *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 166; *Farrington v. South Boston R. Co.* 150 Mass. 406. The complaint, upon most liberal construction, fails to allege that either of the purchasers of the stock certificates wrongfully issued by Babcock was ignorant of their falsity or relied thereon. It therefore does not state facts sufficient to show even that any liability has been cast upon the plaintiff by reason of their issue. Such being the case, there is no occasion to consider the further question whether an action could be maintained upon breach of the bond in suit when such breach had merely resulted in creating a liability, and before plaintiff had actually been compelled to pay anything thereon. On that general subject see *Lyle v. McCormick H. M. Co.* 108 Wis. 81; *Farnsworth v. Boardman*, 131 Mass. 115, 122; *Kip v. Brigham*, 7 Johns. 168; *Jackson v. Port*, 17 Johns. 479. We cannot avoid the conclusion that, although the complaint sufficiently alleges official misconduct of Babcock, and, consequently, a technical breach of the bond, it fails to show that any damage has thereby been caused the company by imposing upon it either pecuniary loss or liability thereto. Hence the demurrer must be sustained.

By the Court.—The order appealed from is affirmed.

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THE TOWN OF WINNECONNE, Appellant, vs. THE VILLAGE OF WINNECONNE, Respondent.

May 21 — June 20, 1901.

Pleading in abatement: Villages: Invalid organization: Curative act: Dismissal of action.

1. As a general rule, subject to exception in case of a plea of former action pending, a plea in abatement is effective if shown to have been true when made.
2. An action was commenced against a village alleged to have been duly incorporated, but it pleaded in abatement its nonexistence as a corporation because the statute under which it had attempted to incorporate was unconstitutional. Afterwards, before the trial, a curative act was passed, declaring all villages theretofore attempted to be incorporated under said invalid act to be duly incorporated. *Held*, that the plea in abatement was not thereby rendered ineffective.
3. Although it is recited in such case that at the trial, after the passage of the curative act, the defendant appeared by its attorney, this must be held to refer to the original supposed defendant, in the absence of anything showing that the village created by the curative act had been brought or had voluntarily come into court; and the action was properly dismissed.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

This action was commenced July 9, 1894, by the plaintiff to recover of the defendant village certain liquor license moneys collected by the village during the years 1891, 1892, and 1893. The complaint alleged the corporate character of the town; that the defendant was a village duly incorporated under ch. 40, R. S. 1878, and lying wholly within the limits of the plaintiff town, and had not at any time provided by ordinance for the support of the poor of said village, and that it had at no time a population exceeding 1,400; that the defendant had attempted to issue licenses to saloon keepers and pharmacists for the sale of spirituous and malt

liquors during the years 1891, 1892, and 1893, and had received as license moneys upon such licenses a sum aggregating $2,796, and had expended of such moneys only the sum of $977.34 for the relief of the poor, and had used the balance thereof for other purposes; that the town system for the support of the poor was in force during all said time in the county of Winnebago and the town of *Winneconne;* and that no part of said moneys has ever been paid to the county. The complaint further alleged demand, and the proper filing of the claim and its disallowance.

The answer pleaded in abatement that the defendant was never a duly incorporated village; that an attempt was made to incorporate the defendant as a village in the year 1887, under the Revised Statutes of 1878, but that the law under which such attempt was made was unconstitutional, and hence that such proceedings were void, and that the defendant never became incorporated.

The facts were stipulated, and the case was submitted upon such stipulation in November, 1899, and findings were made at that time by the court to the effect that the defendant was formally incorporated June 3, 1887, under the general law then existing for the organization of villages, and that said law was unconstitutional, and hence that no such village as the village of *Winneconne* had ever existed. On these findings the complaint was dismissed, without costs, and the plaintiff appeals.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Fred. Beglinger.*

For the respondent there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

WINSLOW, J. Had the village of *Winneconne* been duly incorporated in 1887, no contention is made but that, under the facts stated, it would have been liable to the town in this action for the license moneys which had not been actually

used in the support of the poor. S. & B. Ann. Stats. secs. 1562, 1562*a*. The complaint was dismissed, however, on the ground that at the time of the institution of the suit, and at the time the plea in abatement was made, there existed no such thing, either *de facto* or *de jure*, as the village of *Winneconne*, because the law under which it was attempted to be incorporated was unconstitutional. *In re North Milwaukee*, 93 Wis. 616. Leaving out of consideration for the moment the question of the effect of the supposed curative act of 1897 (ch. 5, Laws of 1897), this position seems to be unassailable because there was not even a *de facto* corporation. This court has held that there can be no *de facto* corporation where there is no law authorizing the formation of a *de jure* corporation. *Evenson v. Ellingson*, 67 Wis. 634; *Gilkey v. How*, 105 Wis. 41. The appellant, however, contends that a plea in abatement, in order to be effective, must be true at the time of the trial of the action (citing *Winner v. Kuehn*, 97 Wis. 394); and that at the time of the trial the village of *Winneconne* had become a legal corporation by virtue of the provisions of ch. 5, Laws of 1897; hence that the plea should have been overruled. It is unnecessary in the present case to consider the legal effect of the last-named act. It will be considered and decided in the case which immediately follows this: *Winneconne v. Winneconne*, *post*, p. 13. Conceding to it all the force that can be claimed for it as a curative statute, we do not see how it can save the plaintiff in the present case. The general principle undoubtedly is that if a plea in abatement is shown to be true when the pleading is made the plea is effective and the plaintiff must seek a better writ. This court and some other courts have allowed an exception to this general rule in case of a plea of former action pending by holding that if a former action be discontinued before the trial of the second action the plea will not be available. *Winner v. Kuehn*, *supra*. We are not aware, however, that this exception to the general rule has

been extended to any other class of pleas in abatement, nor are we referred to any cases so holding.

Other considerations in the present case seem to lead inevitably to the same result. The plaintiff obtained service upon a supposed corporation which did not exist *de facto* or *de jure*, and such supposed corporation made answer alleging its nonexistence. No answer nor notice of appearance was ever made or served by the village of *Winneconne* after the passage of the supposed curative act. It is true the case was tried after the passage of that act, and it is recited that the defendant appeared by its attorney, but this must, we think, be held to refer to the original supposed defendant, in the absence of anything showing that the village created by the curative act had voluntarily come into court and taken up the defense. Furthermore, the curative act does not purport to save actions pending, but only to validate causes of action. Upon the whole record, we are satisfied that the action was rightly dismissed, both because the plea in abatement was effective, and because the present legally existing village of Winneconne has never been brought into court.

By the Court.— Judgment affirmed.

THE TOWN OF WINNECONNE, Appellant, vs. THE VILLAGE OF WINNECONNE, Respondent.

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May 21 — June 20, 1901.

Villages: Invalid organization: Curative act: General law: Retrospective act: Liability for debts: Constitutional law.

By ch. 5, Laws of 1897, all villages theretofore attempted to be incorporated under certain void statutes are declared to be and to have been duly incorporated, and to have all the powers of duly incorporated villages, and all duties, obligations, and liabilities assumed

by any of said villages, and all causes of action existing against them, are declared valid and efficient to the extent that the same would have been of force had their organizations been regular and the acts under which they were organized valid. *Held:*

(1) The act, being applicable to a class, is a general law.

(2) The language declaring the villages *to have been* duly incorporated is ineffective, so far as it is retrospective or purports to declare the attempted incorporation valid *ab initio.*

(3) The act is an exercise of the power of the legislature, under sec. 3, art. XI, Const., to create municipal corporations; and it was competent for it to provide, as a part of the act of creation, that they should pay the just debts and obligations supposed to have been duly incurred by the voluntary and unauthorized organizations to whose property they succeed.

APPEAL from an order of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

This action was commenced May 20, 1900, to recover certain license moneys alleged to have been collected by the village during the years 1894 and 1695, under the same circumstances, except as to the time, as are set forth in the action under the same title as above, which is decided herewith, *ante*, p. 10. The complaint in the present action, in addition to allegations substantially the same as those in the immediately preceding action, set forth at length the facts as to the attempted incorporation of the defendant village, and also pleaded the passage of ch. 5, and sec. 6 of ch. 287, of the Laws of 1897, as validating acts. The answer pleaded in abatement that the defendant was not an incorporated village when the moneys sued for were collected and the cause of action accrued. A general demurrer to this answer was overruled, and the plaintiff appealed.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Fred. Beglinger*. As to the validity of the act of 1897, they cited *State ex rel. Clancy v. McGovern*, 100 Wis. 666; *State ex rel. Oblinger v. Spaude*, 37 Minn. 322; Sutherland, Statutory Construction, §§ 483, 484; Sedgwick, Stat. & Const. Law, 170–173; Cooley, Const. Lim.

(5th ed.), *369–*371, *373, *375, *381; *State v. Squires*, 26 Iowa, 340; *Single v. Marathon Co.* 38 Wis. 363.

For the respondent there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck*. They argued, among other things, that the legislature had no authority to confer upon the circuit court the power to incorporate villages. Hence the provisions of ch. 40, R. S. 1878, under which the village of Winneconne was attempted to be incorporated were void, the circuit court had no jurisdiction thereunder, and all its acts in respect to such incorporation were absolutely void, not merely voidable, and could not be validated by any curative law. *Kimball v. Rosendale*, 42 Wis. 412; *Strosser v. Ft. Wayne*, 100 Ind. 443; *Hart v. Henderson*, 17 Mich. 218; Cooley, Const. Lim. (5th ed.), 472; Sedgwick, Stat. & Const. Law (2d ed.), 143; *People v. Goldtree*, 44 Cal. 323.

WINSLOW, J. This case is a companion case to the case of *Winneconne v. Winneconne*, *ante*, p. 10; but, this action having been commenced after the passage of ch. 5, Laws of 1897, the only question presented by the demurrer is as to the effect of that act. So far as applicable to this case, the act in question provides that all villages theretofore attempted to be incorporated under the provisions of ch. 40 of the Revised Statutes of 1878 are declared to be and to have been duly incorporated, and to have all the powers, privileges, and immunities of duly incorporated villages, and all duties, obligations, and liabilities assumed by any of said villages, and all causes of action existing against them, are declared valid and efficient to the same extent that the same would have been of force had their organizations been regular and the acts under which they were organized valid. Doubtless there existed a large number of supposed villages which had been organized under the laws referred to in the act, and hence there can be no doubt but that the act itself, being an act applicable to a class, was, under very familiar

principles, frequently stated by this court, a general law, because applicable to a class.

It may be at once admitted that the legislature could not validate the orders by which such villages as the one in question here were attempted to be incorporated, because there was no constitutional law authorizing such orders in existence, and the legislature cannot validate or ratify an act which it could not have previously authorized. *Kimball v. Rosendale*, 42 Wis. 407. And hence the language of the act, to the effect that the villages in question are deemed to *have been* duly incorporated, may be admitted to be ineffective, so far as it is retrospective or purports to declare that the incorporation is to be deemed valid *ab initio*.

But there is another consideration which seems decisive of the present case. The legislature has plenary power to provide for the organization of cities and villages by general law. Const. art. XI, sec. 3. It may, in the exercise of such power, attach such conditions or obligations to the grant of municipal powers and privileges as it sees fit, and may compel the recognition and assumption of obligations not binding in law, but which are just and equitable in their character. *Guthrie v. Territory ex rel. Losey*, 1 Okl. 188, 21 L. R. A. 841. It is to be noted that this is not the case of an attempt by the legislature to *compel existing* municipal corporations to pay obligations and levy taxes against their will. *State ex rel. McCurdy v. Tappan*, 29 Wis. 664. The law in question is a law which, in substance, creates municipal corporations where there were none before, and which, as a part of the act of creation, provides that they shall pay certain obligations supposed to have been duly incurred by the voluntary and unauthorized bodies to whose property they succeed. The assumption of the obligations is simply a condition attached to their corporate existence. It is not necessary for us to enter into any discussion of the vexed question as to the power of the legislature to compel an existing municipal corporation to pay obligations not

previously binding upon it. This question has received attention in *Hasbrouck v. Milwaukee*, 13 Wis. 42, and *State ex rel. McCurdy v. Tappan*, *supra*. There was no corporation prior to the act. The legislature created one, and by the same act endowed it with the property and property rights of a pre-existing voluntary organization, and required it to pay the just debts and obligations of that organization. We can see no objection, from any point of view, to this legislation. It seems to us simply the exercise of the undoubted power of the legislature to create municipal corporations. It is quite analogous to the power, which is frequently exercised, of apportioning the property and liabilities of a vacated town among the towns to which its territory is attached (*Knight v. Ashland*, 61 Wis. 233); or the power of apportioning the property and liabilities of an existing county upon the creation of a new county from a part of its territory (*Land, L. & L. Co. v. Oneida Co.* 83 Wis. 649). No vested rights have been interfered with. Corporations have been created by the legislature burdened with the payment of certain claims. That this act was within the power of the legislature we can entertain no doubt.

By the Court.— Order reversed, and cause remanded with directions to sustain the demurrer.

AINSWORTH, Respondent, vs. WILLIAMS, Appellant.

May 21—June 20, 1901.

Contracts: Lease made on Sunday: Recovery for use and occupation: Evidence.

A lease of land made on Sunday is void, and in the absence of a subsequent reaffirmance thereof a recovery of rent at the rate stipulated cannot be had from the lessee, without proof that that was the reasonable value of the use and occupation.

Ainsworth vs. Williams.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action on a lease of a certain fifty-five acres of land for the season of 1899, at an agreed rental of five dollars per acre. Plaintiff's testimony tended to prove that one Minna Eichstaedt was the owner of a life estate, and her daughter, Herminnie Eichstaedt, the owner of the remainder, in the land in question; that, defendant having gone upon said land in the spring of 1899, a conversation took place in July, in which it was agreed that he should pay five dollars per acre for the land. The only such conversation was on a Sunday. On defendant's part it was claimed that the daughter, Herminnie, under authority from her mother, both actual and inferable from a custom of dealing for several years, leased said premises to him by written lease dated April 15, 1899, for five years, at an annual rental of four dollars per acre, in semi-annual instalments, only one of which had become due, and which, before the commencement of the suit, had been paid to the said Herminnie. Minna Eichstaedt denied any agency in Herminnie or any authority to her. Minna assigned the claim for rent to the plaintiff.

The issues being submitted to the jury, they brought in a verdict of $275, one year's rent at $5 per acre, in favor of the plaintiff. No motion to direct a verdict was made by the defendant, but after verdict a motion for a new trial, on the ground, among others, that it appeared by undisputed evidence that the transaction in July between Minna Eichstaedt and the defendant took place on Sunday and was therefore void. The motion was overruled, and judgment rendered for the plaintiff, from which defendant appeals.

For the appellant there was a brief by *W. E. Cavanaugh*, attorney, and *Gabe Bouck*, of counsel, and oral argument by *Mr. Cavanaugh.*

For the respondent the cause was submitted on the brief of *S. A. Corning.*

DODGE, J. The only possible foundation for the verdict in this case is the testimony of Minna Eichstaedt that her daughter had no authority to make a lease of her land, and that she herself made none, except at a certain conversation at the farm in July, after defendant had been in occupation since April, relying on his written lease from the daughter. It was conclusively established that such conversation took place on Sunday. Any contract then made is, of course, void, and cannot support a recovery. *Hill v. Sherwood*, 3 Wis. 343; *Vinz v. Beatty*, 61 Wis. 645; *Cohn v. Heimbauch*, 86 Wis. 176, 180; *Williams v. Lane*, 87 Wis. 152, 158. Without that contract there is nothing to support the claim or recovery of five dollars per acre rental, since there is no evidence as to the reasonable value of the use and occupation. *Thomas v. Hatch*, 53 Wis. 296. There is here none of the circumstances of subsequent reaffirmance of the Sunday-made contract, which in some cases have been held sufficient to justify recovery notwithstanding the invalidity of the original. *Melchoir v. McCarty*, 31 Wis. 252; *Troewert v. Decker*, 51 Wis. 46; *Williams v. Lane, supra.* The verdict was without support in the evidence, and should have been set aside on the motion made by appellant.

By the Court.— Judgment reversed, and cause remanded for a new trial.

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111 19
115 1611

THE STATE EX REL. NELSON, Respondent, vs. MOTT, Appellant.

May 21— June 20, 1901.

Quo warranto: *Action, by whom brought: City charter construed: Elections by council: "Equal division": Deciding vote.*

1. Under sec. 3466, Stats. 1898, an action of *quo warranto* against a person usurping the office of school commissioner in a city may be brought in the name of the state by a private person.

2. Under a city charter providing that in elections by the common council a majority of the votes of the aldermen entitled to seats in the council shall be necessary for a choice, but that "in case of *an equal division* the mayor may give the deciding vote," the mayor can cast the deciding vote only when the votes of all the aldermen are equally divided between two candidates, and not when, though one candidate has received one half of such votes the remaining votes are divided between other candidates.

APPEAL from an order of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

J. C. Kerwin, for the appellant.

For the respondent there was a brief by *Henry Fitzgibbon*, *John F. Kluwin*, and *Bouck & Hilton*, and oral argument by *Gabe Bouck*.

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action to oust and exclude the defendant from the office of school commissioner of the Third ward of the city of Neenah, on the ground that he had unlawfully usurped and intruded into the same. The complaint alleges, in effect, that during the times mentioned the relator was an elector, resident, and taxpayer of the city; that the city was divided into four wards, numbered accordingly; that there were two aldermen from each ward; that by the charter of the city one commissioner for each ward in which the term was about to expire was to be annually elected prior to the 1st day of June, by the common council, voting by ballot, for the term of two years; that in 1898 one John M. Callahan, a duly qualified elector in and for the Third ward, was duly elected such commissioner of that ward, and duly took and filed the oath of office, and on the first Monday of July, 1898, entered upon the discharge of the duties of such office, and continued to exercise such duties to the expiration of his term, in July, 1900; that in May, 1900, the common council from time to time attempted to elect a successor to Cal-

lahan in such office; that 177 ballots were taken, and upon nearly every ballot the defendant received the votes of four of the eight aldermen, and that the votes of the other four aldermen were scattered and cast for different persons; that on the last ballot, taken May 31, 1900, the defendant, *Wesley Mott*, received four votes, J. M. Callahan three votes, and F. J. Sensenbrenner one vote, whereupon, and after such result of that ballot had been announced, the mayor of the city, presiding over the common council, wrongfully, illegally, and without any authority of law therefor, cast his ballot and voted for *Wesley Mott*, the defendant in this action, and declared him elected school commissioner of the Third ward of the city of Neenah for the term commencing on the first Monday of July, 1900; that thereupon the defendant, *Wesley Mott*, without authority, illegally, wrongfully, on June 1, 1900, took and filed the oath of office of school commissioner of the Third ward of the city of Neenah on the first Monday of July, 1900, wrongfully and without authority of law entered upon the discharge of the duties of said office as such, and usurped and intruded into the office of school commissioner in and for the Third ward of the city, and ever since has unlawfully usurped, held, intruded into, and exercised the same and the duties thereof, and now unlawfully usurps, holds, intrudes into, and exercises the same and the duties thereof; that no successor to Callahan has been elected, and that the office is vacant; that the mayor had no right or authority to give such casting vote, nor to declare the defendant elected to such office, and that his acts in that regard were null and void; that the giving of such casting vote by the mayor was in direct conflict with the provisions of the city charter, which declares that a majority of the votes of the aldermen entitled to seats in the common council shall be necessary to a choice in the election of such officers as are elected by the common council, and that in case of an equal division the mayor may give the deciding vote.

The charter of the city expressly declares that: "The elective officers of said city shall be a mayor, two aldermen from each ward, constituting the common council . . . one school commissioner from each ward," etc. Sec. 5, ch. 184, Laws of 1883. It also declares that: "The mayor and aldermen shall constitute the common council. . . . Five aldermen shall constitute a quorum for the transaction of business, but a smaller number may adjourn to a set time." Sec. 44. The charter also declares that: "All officers of said city not declared elective by this act, and all other officers necessary for the proper management of the city affairs, shall be elected by the common council. All elections by the common council shall be by ballot, and a majority of the votes of the aldermen entitled to seats in the council shall be necessary for a choice. In case of an equal division, the mayor may give the deciding vote." Sec. 13.

The action was properly brought by the relator in the name of the state. Sec. 3466, Stats. 1898.

The charter is therein "declared to be a public act" that "shall be liberally construed in all courts of this state." Sec. 183, ch. 184, Laws of 1883. Counsel for the defendant contends that by such liberal construction it should be held that the four aldermen and the mayor had the power to elect the defendant as such school commissioner. It is conceded, however, that four aldermen and the mayor would have had no power to so elect if there had been only five, six, or seven aldermen present; for in that event there could have been no equal division "of the votes of the aldermen entitled to seats in the common council," as required by the charter. The contention is that as the eight aldermen were all present, and four of them voted for the defendant, and the other four were divided between two other candidates, there was an equal division "of the votes of the aldermen entitled to seats," upon the single proposition whether the defendant should be elected to the office. In other words, counsel contends that there were at the time three propositions pending

before the common council,—one single proposition as to the election of each of the three candidates,—and that every vote not cast for the defendant was effectually cast against him. But we do not understand that there were any such three separate propositions pending before the common council at the time. The only question so pending before that body was, Who shall be elected to the office of school commissioner for the Third ward? Upon that controversy there was no equal division of the aldermen that could be decided by the casting vote of the mayor. Counsel contends that the mayor could terminate the controversy by voting for the defendant, as he did; but he concedes that, had the mayor voted for either of the other candidates, then his vote would not have terminated the controversy or decided anything, since the controversy in that event would have continued the same as though he had not voted at all. It would be a solecism to hold, under the statute quoted, that "the *deciding* vote" of the mayor should only terminate the controversy in case he voted one way, but should have no effect if he voted the other way. A casting vote, with no power of choosing which way the controversy shall be decided, is not "the deciding vote" prescribed in the charter.

By the Court.—The order of the circuit court is affirmed.

THE STATE EX REL. THE WISCONSIN TELEPHONE COMPANY, Appellant, vs. THE CITY OF SHEBOYGAN and others, Respondents,

May 21—June 20, 1901.

111	23
114	s250
s114	506
s114	508
111	23
116	s150

Telephone companies: Right to use streets: Grant of franchise: Right of city to regulate and impose conditions.

1. The word "highway," as used in sec. 1778, Stats. 1898 (authorizing any telephone company to construct its lines along any public highway), covers the streets and ways of a city, as well as rural highways.

2. Sec. 1778, Stats. 1898, grants to telephone companies a franchise to use the streets, and although a city may, under its charter, have power to regulate such use, yet its consent to the construction of a telephone line on certain streets is necessary only in view of such right to regulate, and the giving of such consent is not the granting of a franchise within the meaning of sec. 940*b*, Stats. 1898.
3. Under its police power to control and regulate the use of its streets, a city may provide by ordinance that the location of all poles shall be subject to the approval of the proper city authorities, and that the further occupation of the streets shall be upon a plan to be approved by the council; but it cannot, under the pretense of regulating, take away entirely the right of a telephone company, under sec. 1778, Stats. 1898, to construct its lines on the streets of the city.
4. When a telephone company submits for the approval of the proper authorities, under such an ordinance, its plans for construction of lines in the streets, it is the duty of such authorities to take affirmative action recognizing the company's right; and they cannot justify a refusal to act upon the ground that the streets are already incumbered by poles and wires and that a change to an underground system should be made "as soon as possible."
5. A city has only such powers with respect to the wires and poles of a telephone company in its streets as have been granted to it by the legislature.
6. Under charter provisions empowering a city to enact proper ordinances and regulations for the government and good order of the city, for the benefit of trade and commerce, to prevent the incumbering of streets, and to regulate the manner of using streets and protect them from injury, the city has no power to impose any conditions upon the use of its streets by a telephone company except such as may fairly be said to be police regulations. It cannot require the company to accept an ordinance fixing the rates to be charged for telephone service; nor can it exact financial benefits to itself, such as a right to purchase the company's exchange, a right to use the tops of the poles for a fire-alarm system, free of charge, or a right to take the company's property by forfeiture in case of nonuse.
7. Nor has the city, in such a case, the right to refuse to act upon the plans of the telephone company submitted for approval, and thus prevent the construction of the proposed lines, on the ground that ruinous competition in telephone rates would result. Its power to regulate trade and commerce does not extend to controlling competition.

The State ex rel. The Wisconsin Telephone Co. vs. City of Sheboygan.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The relator, *The Wisconsin Telephone Company*, presented to the circuit court for Sheboygan county its petition for an alternative writ of *mandamus*, setting out the following facts:

The relator is a Wisconsin corporation, organized in 1882, conducting a telephone business and maintaining telephone lines and exchanges in this state. The defendant city of *Sheboygan* is a municipal corporation, and the other defendants mayor, clerk, and aldermen of said city. The petition sets out the charter provisions regarding control and regulation of city streets, and that in 1893 the council adopted an ordinance providing that the location and erection of all poles, etc., should be subject to the approval of the city authorities, and that the occupation of all streets not already occupied should be upon a plan submitted and approved by the common council. In 1882 the relator established an exchange in the city of *Sheboygan*, which was a part of its state system and connected with other exchanges east of the Mississippi and north of the Ohio rivers. The exchange was established without any grant of authority or permission from the city, but its poles were put up and wires strung with its knowledge and consent, and without objection, until 1893, when a competing line was built under an ordinance, a copy of which was attached. Since that time the city has insisted that relator had no right to place any additional poles upon any of its streets without permission, has refused to consent to the location of any poles or to the extension of its system, has used force to prevent the same, and has seriously interfered with the making of necessary repairs. Since 1893 relator's exchange has not been, and is not now, in accord with the most approved plan of telephone construction, in particulars fully set out. There are many places in the city which cannot be supplied with telephones

as the lines are now located, and cannot be reached without setting up additional poles. Relator has been and is now desirous of perfecting its system, extending its lines, and making the same according to the most approved plan of telephone construction. On September 11, 1899, the relator presented to the mayor and common council a petition stating its desires and a willingness to conform to any and all reasonable requirements or changes thought necessary or desirable in its proposed plan. Attached to the petition was a map of the city showing the location of its poles, the changes proposed, and extensions contemplated. The city authorities were asked to approve the plan and grant permission for the proposed extensions and changes, and, if the plan was not approved, to suggest such changes therein as were deemed for the best interests of the city. Such petition was referred to a special committee of the council. After a conference with the representatives of the company, the committee reported that the latter refused to accept a franchise on the same conditions granted to the Northwestern Telephone Company, which was the competing company before referred to, and recommending that action on the petition be temporarily postponed. Such report was adopted, and no further action on said petition has been taken.

The petition herein further sets out that relator was willing to accept a franchise which conformed to the one mentioned except so much of the same as assumed to regulate the rate of telephone charges, and except as to the following requirements: a provision that, should the city desire to purchase the exchange at a price to be fixed by appraisers, it would convey its exchange to the city; the use of the top thirty inches of all poles for the police and fire-alarm or other electric system, free of charge; a condition that, in case the company failed to maintain and operate its exchange, its rights should be forfeited and its property and poles therein

used by the city should become the property of the city; and, lastly, in case the city should construct an exchange for the use of its officials, and not for private use, the city should have the right to connect its exchange with that of relator, and have the same right to use its telephones in connection with relator's as are given to its patrons, free of charge. The refusal of the city to approve the plan presented prevents the relator from making the changes and extensions desired, and, unless the city be required to take action thereon, relator has no remedy in the premises.

An alternative writ of *mandamus* was issued, to which the defendants made due return. After many admissions and denials, the return sets out that the petition, map, and plan of relator before referred to was intended by relator to constitute, and would in law constitute, if approved by the city, a grant or franchise to use the streets and alleys named for its purposes, and that no application for such franchise had ever been published in the official paper of the city, as required by sec. 940*b*, Stats. 1898; that the action of the council on said petition was not based solely upon the refusal of relator to accept a franchise fixing rates, but was based upon the power, authority, and discretion of the common council to require and enact reasonable regulations and by-laws, such as were contained in the franchise granted to the other company, and embodying the conditions hereinbefore mentioned. The return also sets out that the streets of the city are now, and since 1896 have been, incumbered and obstructed to a great extent by the poles of the different telephone, telegraph, electric light, and electric street-railway companies, and by poles belonging to the city used for its fire-alarm system; and that a prudent exercise of the power vested by law in the council requires that a change be made in the mode of running wires, and that they be required to run underground as soon as practicable. It also sets out that relator has not and cannot

obtain the consent of lot-owners to place poles in the streets, and has not the power of eminent domain, and that the granting of the petition would be vain and nugatory. Further, that the relator's exchange was erected without right; is defective and inadequate; a source of annoyance and a nuisance to the inhabitants; is being maintained to create a monopoly, and to compel the other company to either raise its rates, go out of business, or consolidate with relator, and to that end has refused to submit to any regulation fixing charges, and has offered its telephones free of charge. The field is limited as to patronage, and a franchise to relator without regulation as to charges would result in impairing the efficiency of service, or in the insolvency or consolidation of the companies. It was to prevent this disastrous condition of affairs, and because the council did not wish to legalize the present unlawful structures of relator in the streets, that the petition of relator was refused. The right to deny the petition as a matter of discretion was also claimed. By further allegations the defendants disclaim the right to control through or long-distance business of the company, but insist that local business may be continued under reasonable regulations. The return sets out an ordinance adopted in 1893 regulating the erection of poles and the stringing of wires for the transmission of electricity, being secs. 183 to 216. Sec. 187 provides that the exact location of all poles shall be subject to the approval of the proper city authorities, and that the occupation of all streets not already occupied shall be upon a plan to be approved by the common council.

A demurrer to the return on the ground that it did not state facts sufficient to constitute a defense to the issuance of the writ was overruled. In a lengthy written opinion, the trial judge bases his ruling largely upon noncompliance with sec. 940*b*. The relator appeals from the order overruling the demurrer.

For the appellant there were briefs by *Miller, Noyes & Miller*, and oral argument by *Geo. P. Miller*. They argued, among other things, that sec. 1778 authorizes telephone companies to use streets for telephone purposes without obtaining any consent from the local governing instrumentalities. This statute was copied from Massachusetts. Laws Mass. 1849, ch. 93. Sec. 3 of the Massachusetts act provides that the poles shall be located where the local authorities may provide. *Young v. Yarmouth*, 9 Gray, 388, 389. When Wisconsin adopted the Massachusetts statute it failed to reenact the third section of the statute. See *Roberts v. Wis. T. Co.* 77 Wis. 589. It is also the duty of a telephone company to make all necessary extensions. Sec. 1791*a*, Stats. 1898. The neglect or refusal of the relator to make necessary extensions in the city of *Sheboygan* so as to afford telephones to all persons applying for the same, subjects it not only to a severe penalty, but is such an offense as would work a forfeiture of its charter under the provisions of sec. 3241. For a failure in this regard the attorney general could file a petition under sec. 3241 to forfeit the franchises of the *Wisconsin Telephone Company*. *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 36. Its duty to make necessary extensions could also be enforced by proper legal proceedings. *Att'y Gen. v. W. W. R. Co.* 36 Wis. 466; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 36. The streets of the city of *Sheboygan* belong to the public, not to the city of *Sheboygan*. 2 Dillon, Mun. Corp. §§ 656, 675; *Paine L. Co. v. Oshkosh*, 89 Wis. 460; *Marshfield v. Wis. T. Co.* 102 Wis. 609; *Milwaukee v. M. & B. R. Co.* 7 Wis. 85; *Sheboygan v. S. & F. du L. R. Co.* 21 Wis. 667; *Janesville v. Carpenter*, 77 Wis. 297. The legislature, having paramount authority over the streets, has delegated to the city of *Sheboygan*, a subordinate local governing instrumentality, the right to exercise in a limited way the police power of the state. This grant of police power to a city to regulate and control the streets

is to be strictly construed and can only be exercised for the general welfare and good order of the city and its inhabitants. 1 Dillon, Mun. Corp. (4th ed.), § 89; 15 Am. & Eng. Ency. of Law (1st ed.), 1041, and note 1; *Hayes v. Appleton*, 24 Wis. 544; *Bell v. Platteville*, 71 Wis. 142; *Dore v. Milwaukee*, 42 Wis. 108; *Gilman v. Milwaukee*, 61 Wis. 588; *Kilvington v. Superior*, 83 Wis. 226; *Becker v. La Crosse*, 99 Wis. 417; *Barling v. West*, 29 Wis. 307; *State ex rel. Wis. T. Co. v. Janesville St. R. Co.* 87 Wis. 79; *Wis. T. Co. v. Marshfield*, 102 Wis. 610, 611, 613; *Wis. T. Co. v. Oshkosh*, 62 Wis. 40. The power to regulate the streets conferred upon a city does not authorize it to exclude a telephone company from the city. *Wis. T. Co. v. Oshkosh*, 62 Wis. 40; *Marshfield v. Wis. T. Co.* 102 Wis. 611; *Mich. T. Co. v. Benton Harbor*, 121 Mich. 512; *Abbott v. Duluth*, 104 Fed. Rep. 833. Power to regulate and control streets does not authorize a common council to grant telephone or other franchises. *Davis v. New York*, 14 N. Y. 506; *Domestic T. Co. v. Newark*, 49 N. J. Law, 344; 2 Dillon, Mun. Corp. (4th ed.), §§ 715–717; Booth, St. R'y Law, 9, note. The power to regulate charges for telegraph and telephone services is not expressly granted by the charter, and is not included in or incidental to the power to regulate streets or the power to regulate the manner of using streets. *St. Louis v. Bell T. Co.* 96 Mo. 623. The city has no authority to exact financial benefits to itself as a condition of its granting to relator a permit to make necessary telephone extensions.

T. M. Bowler, city attorney, for the respondents, contended, *inter alia*, that in all cases where its consent is required the city can fix the maximum charge for any public service within the city which requires the use of its streets, as a regulation of such use. *Rogers Park W. Co. v. Fergus*, 178 Ill. 571; *S. C.* 180 U. S. 624; *Danville v. Danville W. Co.* 180 Ill. 235; *Danville W. Co. v. Danville*, 180 U. S. 619; *Freeport W. Co. v. Freeport*, 186 Ill. 179; *S. C.* 180 U. S.

587. The city of *Sheboygan* might fix the fare to be charged by hackmen and cabs for the purpose of preventing extortion and under the authority to regulate. *Comm. v. Gage*, 114 Mass. 328; *Comm. v. Duane*, 98 Mass. 1; Dillon, Mun. Corp. (4th ed.), §§ 357, 359, and cases. See, also, as to necessity for regulating telephone companies, *Richmond v. Southern B. T. Co.* 174 U. S. 761. A municipality which is empowered by law to consent to the use of its streets, although not authorized specially to impose conditions, may nevertheless impose reasonable conditions. *Allegheny v. Millville, E. & S. St. R. Co.* 159 Pa. St. 411; *Chicago G. R. Co. v. Chicago*, 176 Ill. 253; Dillon, Mun. Corp. (4th ed.), § 706; *Mich. T. Co. v. Charlotte*, 93 Fed. Rep. 11. Making this police regulation a condition of consent at the time of granting permission to use the streets need rest on no express provision of statute or charter. *Allegheny v. Millville, E. & S. St. R. Co.* 159 Pa. St. 411; *Chicago G. R. Co. v. Chicago*, 176 Ill. 253; *Adams v. Union R. Co.* 21 R. I. 134; *People ex rel. West Side St. R. Co. v. Barnard*, 110 N. Y. 548.

BARDEEN, J. The relator is a Wisconsin corporation organized for the purpose of establishing, maintaining, and operating a system of telephones in this state. It has such powers, and is subject to such restrictions and regulations, as are granted and prescribed by law. Its authority to use and occupy the streets and highways of the state is granted by sec. 1778, Stats. 1898, which came into existence in 1848. So far as is material to this litigation, such section reads as follows:

"Any corporation formed under this chapter to build and operate telegraph lines, or conduct the business of telegraphing, may construct and maintain any such lines with all necessary appurtenances, from point to point upon or along or across any public road, highway or bridge or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure;

. . . but no such telegraph line or any appurtenance thereto shall at any time obstruct or incommode the public use of any road, highway, bridge, stream or body of water."

The right of a telephone company to organize, to erect lines, and to do business under our laws, and especially under sec. 1778, was first challenged in the case of *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32. That right was vindicated in an opinion by the present chief justice, which has been cited with approval in many jurisdictions. *Duke v. Central N. J. T. Co.* 53 N. J. Law, 341; *Cumberland T. & T. Co. v. United E. R. Co.* 12 L. R. A. 544; *Hudson River T. Co. v. Watervliet T. & R. Co.* 135 N. Y. 393; *Southern Bell T. & T. Co. v. Richmond*, 78 Fed. Rep. 858. This court has sanctioned the doctrine stated in *Roberts v. Wis. Tel. Co.* 77 Wis. 589; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604; *Krueger v. Wis. Tel. Co.* 106 Wis. 96. The exact nature and scope of the power thus conferred has at no time been definitely treated. In the *Oshkosh Case* this court held that a telephone company might lawfully organize under ch. 86, and construct and operate its lines under sec. 1778, and it was there said that the company was occupying the street "*not only by express grant of the legislature*, but by express permission of the city authorities." In the *Roberts Case* the contest was whether poles set by the company were unlawful structures in a highway. In disposing of this question COLE, C. J., remarks:

"Was it lawful to place these poles in the highway? The statute authorizes any corporation formed to build and operate telegraph lines or conduct the business of telegraphing to construct and maintain its lines, with all necessary appurtenances, along a public highway. Sec. 1778, S. & B. Ann. Stats. And in *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, it was held that the statute included telephone companies, although such companies were not specifically mentioned therein. The poles, then, were not unlawful structures in the highway, but were authorized by law to be set therein."

In the *Marshfield Case* we said the section in question authorized the use of the highways of the state by poles and wires, provided they were set so as not to obstruct or incommode the public use thereof. In the *Krueger Case* we held the statute granted no power to use the street except as against the public. Under it the public were foreclosed of the right to object to the poles being in the street, but the lot-owner might pursue his legal remedies.

Several of these cases related to the right to place poles in city streets, and it was assumed that the word "highway" was broad enough to and did cover the streets of a city. That proposition is now disputed by the defendants. We will not pursue their argument. Sec. 4971 is to the effect that in the construction of statutes the word "highway" may be construed to include any road laid out by the authority of any town, city, or village. In view of the course of decisions and the importance of the rights involved, we see no good reason for turning from the position tacitly assumed in the cases noted. We therefore hold that the word "highway," as used in sec. 1778, covers the streets and ways of a city, as well as rural highways. We find support in this conclusion in a recent case in the federal court, construing a somewhat similar statute of Minnesota. *Abbott v. Duluth*, 104 Fed. Rep. 833. A still more recent and extended discussion of the same statute by the supreme court of that state may be found in *Northwestern Tel. Exch. Co. v. Minneapolis*, 86 N. W. Rep. 69, where the same conclusion is reached. The right to construct and maintain poles in city streets is as ample and positive as to build in the country highways, except that it may be subject to stricter police regulations, as will be more fully discussed in a subsequent portion of this opinion.

Not one of the cases referred to can be justified except upon the theory that the statute in question grants to corporations of this kind a franchise,—a special privilege, which

could not be legally exercised without legislative authority. Under it, great corporations have been organized, vast sums of money have been expended, thousands of miles of poles and wires have been erected, and the systems are being extended until the remotest hamlet in the state may communicate with the business centers with the utmost ease. So far as we are aware, this is the only statute from which the authority and power mentioned arises. It came from the ultimate source of power, the legislature, and passed directly to such organizations as come within its terms.

The trial court reached a somewhat different conclusion. His reasoning runs thus: The right to use the streets is a franchise. No franchise can be enjoyed or held which is not derived from the state. The legislature may delegate to municipal corporations power to make by-laws and ordinances which shall have the force of legislative acts. The charter of the city of *Sheboygan* gives the common council authority to control its streets, to make ordinances for the government and good order of the city and for the benefit of trade and commerce. In the *Marshfield Case*, 102 Wis. 604, this court held that sec. 1778 did not deprive cities of their power of police control over the manner in which the work of such corporations shall be done, or of the power to regulate the location and use of poles and wires in the streets. The city, therefore, having the power to regulate, control, and to prevent the incumbering of certain of its streets in the exercise of a reasonable discretion, when called upon to exercise these powers, or take action as requested by relator's petition, was granting a franchise. Sec. 940*b*, Stats. 1898, provides that no franchise shall be granted by any village board or common council until the application therefor, containing the substance of the privileges asked for, shall be filed with the village or city clerk and be published in the official paper. The relator failed to comply with these requirements, and hence the return states a good defense.

In reaching this conclusion the court failed to keep in mind the distinction between the rights or franchises granted by the state and the power of police control possessed by the city. As we have already seen, the power to exist as a corporation, and to exercise the franchise of the use of highways and streets, as against the public, was already possessed by the relator. The city had no power to add to or detract from it except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only in recognition of its existence, and in conformity with a just and reasonable administration of the police power in the interest of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privilege was controllable only in harmony with the rights both possessed. In no proper sense was the privilege sought a franchise, within the meaning of sec. 940*b*. The consent of the city was only required or asked in view of its right to regulate. Having that power, it was its plain legal duty, when a plan had been submitted as its ordinance required, to take such action thereon as reason and a proper regard for the interests and legal rights of all concerned would seem to suggest. It was no answer for the city to say, as it did in general terms in its return, that the streets of the city were already incumbered by poles and wires, and that a due regard for the safety and convenience of its people rendered it prudent that a change be made "as soon as possible" in the manner of running wires used for electric purposes from poles to an underground system. If the time had arrived, and the exigencies were such, that such a change

was necessary, it was its duty to act, and to adopt such plan as reason and enlightened judgment might suggest.

In the first case in which this court was ever called upon to consider the reciprocal rights of the company and the city, a line was blazed with accuracy, and has since been followed in all the cases. The charter of Oshkosh contained a provision broader in terms than any contained in defendant's. It gave the common council authority "to regulate, control and *prohibit* the location, laying, use and management of telegraph, telephone and electric light and power wires and poles." In disposing of the question raised, this court said:

"But we do not think this was designed as giving to the municipality absolute authority to exclude such companies altogether from carrying on or operating their business within the corporate limits of the city, but simply to regulate the same, and to prohibit such location in improper places; otherwise the municipalities of the state would have the power to nullify what the legislature had expressly authorized. Undoubtedly, the common council, under the charter, had a right to regulate, in order to guard and secure the public safety and convenience; but their regulations, to be valid, should have been reasonable and fair, and not have gone to the extent of confiscation, nor of wholly excluding the plaintiff from the city." *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 40.

The police power possessed by the city, as said in *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, extends to the protection of the lives, health, and property of citizens, and to the promotion of good order and good morals. It is not easy of exact definition, or possible to fix upon it exact limitations or restrictions. "It is easier to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise." *Comm. v. Alger*, 7 Cush. 53. It arises under what has been termed "the law of overruling necessity." But it has its limitations. Certainly, its exercise must be reasonable and calculated to

promote the ends suggested. *Hayes v. Appleton*, 24 Wis. 544; *Barling v. West*, 29 Wis. 307. Neither the city nor the state can destroy or essentially modify corporate franchises, except as the power is reserved in the original grant or by the constitution. They may regulate the mode of doing business with reference to the comfort, welfare, and safety of society, but cannot, under the pretense of regulating, take away any of the essential rights and privileges which the charter confers.

In the exercise of its police power to control and regulate its streets the city passed an ordinance providing that the location of poles should be subject to the approval of the proper authorities and that the further occupation of its streets should be upon a plan to be approved by the council. This was reasonable, and the relator cannot and does not object to it. In the petition presented to the council it signified its readiness to conform to all reasonable requirements, and, if the plan presented did not meet with approval, it was ready to change the same to meet the wishes of the authorities. But the city seeks to go much further. It, in effect, says to relator: "Before you can make any changes, or extend your system, you must consent to an ordinance fixing rates of charges to patrons. You must consent to sell your privileges at an appraised value in case the city shall desire to purchase. You must consent to the free use by the city of the top thirty inches of all poles for its police and fire-alarm system. In case you shall fail to operate and maintain your exchange, any poles or property in any way used by the city shall become its property. And, finally, if the city shall construct and operate an exchange for the use of its officers and departments, it shall have the right to connect with your exchange, and have the rights, privileges, and service given other subscribers, free of all rental charges." These, in brief, are the conditions insisted upon by the city that shall be accepted by the relator, and are set up in the

return as an excuse for not obeying the writ. The relator insists that the city has no power to impose any such conditions. None of them can be justified unless they can be said to fairly come within the purview of police regulations. The argument in behalf of the city is based entirely upon the power of the city to regulate and remove encroachments on its streets and to regulate trade and commerce. The fixing of maximum charges for use of telephones or service in the city is said to be a lawful police regulation to prevent extortion. This is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. *Such power* is inherent in the state, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant or by necessary implication from other powers granted. Every citizen holds his property subject to the proper exercise of this power either by the state legislature directly or by public or municipal corporations to which the legislature may delegate it. 1 Dillon, Mun. Corp. § 141. Speaking on the general proposition, the same learned author states the rule thus:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Sec. 89.

That rule has been substantially adopted and approved in this state. *Hayes v. Appleton*, 24 Wis. 542; *Gilman v. Milwaukee*, 61 Wis. 588; *Bell v. Platteville*, 71 Wis. 139; *Kilvington v. Superior*, 83 Wis. 222; *Becker v. La Crosse*, 99 Wis. 414. Whatever power a municipality possesses over

the wires and poles of a telephone company in its streets must be granted it by the legislature. 2 Dillon, Mun. Corp. § 698. The charter of the city of *Sheboygan* empowers it to enact proper ordinances and regulations for the government and good order of the city, for the benefit of trade and commerce, for the suppression of vice and the prevention of crime, to prevent the incumbering of streets, to provide for the removal of obstructions therein, to regulate the manner of using streets, and to protect them from injury. As we have already seen, this grant of power does not authorize the city to wholly prevent the relator from doing business within its limits. No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. *Michigan T. Co. v. Benton Harbor*, 121 Mich. 512. It has no authority to impose other conditions. That power rests in the legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail. *St. Louis v. Bell T. Co.* 96 Mo. 623. The case of *Allegheny v. Millville, E. & S. St. R. Co.* 159 Pa. St. 411, cited by defendants, has no application here. It was based upon the ground that under the constitution of Pennsylvania no street railway shall be constructed within the limits of a city without the consent of the local authorities. For that reason the imposition of a condition regulating rates of fare was justified. Neither does the power come to the city under the general authority to pass ordinances for the government and good order

of the city and for the benefit of trade and commerce. To say that under this general power the city may fix rates for telephone service would be going entirely too far. The charter otherwise points out the cases in which the city may exact licenses and fix rates, and any attempt to extend the power would be running directly in the face of the rule laid down by this court in the *Oshkosh Case*, 62 Wis. 32.

What has been said applies with almost equal force to the other conditions insisted on by the city. We do not see how, under the power it now possesses, the city can rightfully withhold action, or base affirmative action on the condition of financial benefits to itself. Such contention must rest largely upon the supposed exercise of power to grant or refuse the right to use the streets. This, of course, the city has no right to do except when the situation is brought within the rule stated in the *Marshfield Case*, 102 Wis. 604. We need not repeat what was there said relative to the right of the city to prohibit the erection of poles on certain of its streets. Such right must be exercised in the light of reason; not with a view of prohibiting the company doing business in any given locality, but reasonably to protect the public against unnecessary obstructions, inconvenience, and dangers, for the general welfare and common protection of all. The right to purchase relator's exchange, if granted, would be a contract right of great value. So, also, as to the right to use the tops of the poles for the fire-alarm system, and the agreement as to forfeiture of property to the city in case of nonuse. Such rights have no relation to the legitimate exercise of the power of police regulation. To permit the city to base its action upon considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. Nothing could be more vicious. Very soon the interest of the public would be at the mercy of local boards. The company willing to yield the greatest number of privileges or pay the most money would get the

greatest favors. The embarrassments growing out of a recognition of the existence of this right are so manifest and so manifold that we need spend no time in discussing them. We say without hesitation that the city has no right to barter with the police power, or exact for itself financial benefits as a condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain.

The further contention that the city may refuse action on the ground that ruinous competition in telephone rates would result, cannot be sustained. The city has no express or implied power to legislate on this subject. Its power to regulate trade and commerce does not extend to controlling competition. Such power as it possesses must be exercised within the lines already suggested, and cannot be extended to cover municipal fears, or to control mere matters of local competition. The course followed by the relator is substantially that mapped out by this court in the *Marshfield Case*. It presented its petition with a plan of its proposed improvements and extensions. It signified its willingness to submit to such changes as were deemed for the best interest of the city. It then became the duty of the city to take affirmative action. What that action should be the court has no power to declare. It can only say "*Act*, and let such action be in harmony with the powers granted in the charter as herein construed."

Considering the return as a whole, we do not think it presents any question of fact for trial, or any legal justification for failing to obey the commands of the writ.

By the Court.— The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer to the return and for further proceedings according to law.

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STACK, Respondent, vs. PADDEN, Appellant.

May 21—June 20, 1901.

Married women: Contracts: Employment of physician.

A married woman living with her husband and possessing separate property at the time she employed a physician to treat herself and her son is not liable at law (under sec. 2345, Stats. 1898) to pay for such services, even though she intended to charge her separate estate, since the contract did not concern her separate property or business.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover for services of plaintiff as a physician and surgeon, commenced in justice's court May 29, 1899. Judgment was there rendered for $52.81 damages and costs. An appeal was taken to the circuit court. The complaint was in the usual form of a declaration to recover upon an account for the reasonable value of services rendered, claiming that such services were performed on and between June 29, 1890, and November 28, 1890; that the same were reasonably worth $36; that $5 was paid November 1, 1890, $3 June 9, 1893, and $2 July 11, 1893. The answer alleged that defendant was a married woman living with her husband when the services were rendered, and that more than six years had expired since such rendition. Upon the trial on appeal objection was made to any evidence under the complaint. The objection was overruled. The complaint was subsequently amended against objection, so as to allege that when the contract for the services was made defendant had a separate estate and contracted with reference thereto.

The evidence was to the following effect: Defendant requested plaintiff to render the services in question, nothing being said about who would pay therefor or her having separate property, and without plaintiff knowing she had

such property. Such services consisted in treating defendant and her son. Plaintiff did not know any one in the transaction was liable to him except defendant, though he knew she was a married woman living with her husband. He always looked to the defendant for pay. She recognized his claim as her personal debt, and made payments thereon from time to time as alleged in the complaint, and promised to pay the entire claim. She owned considerable property when the services were contracted for. The services were rendered pursuant to several distinct calls upon plaintiff, the last being on October 12, 1890. The value of the services rendered under the last call was $15. When defendant made the several payments, the claim, as an entirety, was presented to her and was recognized as her personal debt, and the payments were made without reference to any particular item thereof.

The court found that the allegations of the complaint were true; that when defendant contracted with plaintiff she was a married woman living with her husband and had a separate estate; and that she contracted with plaintiff with reference to such estate. The court decided as matter of law that plaintiff was entitled to judgment substantially as prayed for in the complaint, and that the judgment of the justice's court should be affirmed with costs. Judgment was rendered upon the findings, in form affirming the judgment of the justice, and also in form for a recovery of the defendant of the sum of $52.81, being the amount of the judgment appealed from, and $18.59 costs.

The cause was submitted for the appellant on briefs by *E. Blewett*, and for the respondent on the brief of *Giffin & Sutherland.*

Counsel for the respondent contended, *inter alia*, that a married woman who contracts for necessaries furnished the family, or for medical services rendered the family, becomes personally liable for such necessaries or services if she has

a separate estate, notwithstanding that she may be living with her husband. *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Mayer v. Lithauer*, 58 N. Y. Supp. 1064; *Campbell v. White*, 22 Mich. 178; *Fafeyta v. McGoldrick*, 79 Mich. 360; *Meads v. Martin*, 84 Mich. 306; *Hirshfield v. Waldron*, 83 Mich. 116; *Nelson v. Spaulding*, 11 Ind. App. 453.

MARSHALL, J. Appellant assigns, as reasons why the judgment should be reversed: (1) The evidence shows that defendant was a married woman living with her husband when the debt was contracted, and does not show that it was contracted with reference to her separate estate intending to charge the same with the payment thereof; (2) the claim was barred by the statute of limitations; (3) the judgment is irregular and unauthorized in that it is, in form, an affirmance of the judgment for damages and costs rendered in the justice's court. As we view the case a decision of the first question renders consideration of the other two unnecessary.

Under the statutes of this state (secs. 2342, 2345, Stats. 1898) partially removing the common-law disability of married women to bind themselves at law by contract, they may contract as if sole, so far as necessary or convenient to the beneficial enjoyment of their separate property or the carrying on of their separate business or in relation to their personal services. *Conway v. Smith*, 13 Wis. 125; *Todd v. Lee*, 15 Wis. 365; *Leonard v. Rogan*, 20 Wis. 540; *Meyers v. Rahte*, 46 Wis. 655; *Krouskop v. Shontz*, 51 Wis. 204; *Mueller v. Wiese*, 95 Wis. 381. This case does not fall within the letter or the spirit of such statutes, nor within any case above cited, nor any other that has been decided by this court. The debt sued on was not contracted in the acquirement of property or in the care or use thereof. We are not dealing here with the proposition of whether a person circumstanced as appellant was may bind her separate prop-

erty in equity by a contract like the one sued on, but whether she can bind herself at law. It is not sufficient that a married woman shall merely make a contract intending to charge her separate property; it must concern her separate property or business or personal services. All the contracts of married women involved in the cases cited, which were sustained, were of the latter character. In *Conway v. Smith* the debt was contracted for work and material in the construction of a hotel building belonging to the defendant. In *Todd v. Lee* the debt was contracted for goods for a millinery business. In *Leonard v. Rogan* the debt was contracted for services in reducing to the possession of the defendant her separate estate. In *Meyers v. Rahte* the debt was incurred for merchandise purchased for the defendant's business as a saloon-keeper. In *Krouskop v. Shontz* the indebtedness was contracted for supplies used by the defendant and her husband in carrying on a farm owned by the defendant. All the other cases in this court where the subject has been considered, in which it was held that the contract of a married woman was binding upon her at law, are of the character of those to which we have referred. The proposition here advanced is that power to make such contracts as are necessary or convenient to the beneficial enjoyment of property includes the power to contract generally from the fact that the party contracting has property with which she may discharge liabilities thus incurred. Our statute does not go that far.

Where this court has said that the partial removal of the common-law disabilities of married women, as regards their ability to contract, enables them to make such contracts, binding at law, as may be necessary or convenient to the beneficial enjoyment of their new rights, it refers to contracts in regard to business in its relation to property, not to the power to contract generally, from the mere fact of the possession of property sufficient to discharge contract

obligations. Otherwise, *Kavanagh v. O'Neill*, 53 Wis. 101; *Emerson-Talcott Co. v. Knapp*, 90 Wis. 35; and *Mueller v. Wiese*, 95 Wis. 381, would have resulted in holding the defendant in each case liable upon her contract instead of not liable. Enjoyment of property, merely as a basis for credit which does not otherwise concern property, has nothing to do with the care or accumulation of property or use of property as such. The former is not and the latter is within the scope of the statute. Counsel cite to our attention numerous decisions from states having statutes different from ours. They have no application to the case in hand and therefore need not be reviewed.

It follows from what has been said that the decision of the trial court, holding defendant liable at law for a debt that in no way concerned her separate property or business, was wrong and must be reversed.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to render judgment for the defendant for costs.

GRAFTON, Respondent, vs. HINKLEY and others, Appellants.

May 22—June 20, 1901.

Judgment: Res judicata: *Parties: Building contracts: Release of sureties.*

1. Contractors agreed to erect a building for plaintiff and gave bond, with certain of the defendants as sureties, for faithful performance of the contract. Before the building was completed a corporation was organized, to which plaintiff conveyed the property. Afterwards the contractors brought suit against the corporation to enforce a lien for an amount alleged to be due under the contract, which was alleged to have terminated when the building was inclosed, and also for the value of labor and materials furnished after such alleged termination of the contract. Neither the plaintiff

herein nor the sureties on the contractors' bond were made parties to that suit, though the corporation notified the sureties of the pendency of the action and that there had been a breach of the bond for which they were liable. No counterclaim for such breach was pleaded in that action. Judgment was rendered therein against the contractors, on the ground that all the services and materials for which the lien was claimed had been rendered and furnished under the original contract, which the contractors had failed to perform, and hence that they were not entitled to such lien. In this action, brought against the contractors and their sureties for breach of the original contract, the contractors counterclaimed for an amount alleged to be due for extra work and materials. *Held*, that the former judgment was not conclusive upon the defendants.

2. A building contract provided that work thereunder should be terminated with inclosing the building unless the contractors should be notified in writing, by a certain date, to complete the work. The contractors waived such written notice and proceeded with the work of completing the building. *Held*, that the sureties on the contractors' bond for faithful performance were not thereby released as to the portion of the contract which was not to be performed unless the written notice was given. DODGE, J., dissents.

APPEALS from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This action is to recover $2,033.88, with interest from December 18, 1897, as damages for the breach of an agreement in writing made and entered into June 1, 1895, by and between the plaintiff, *Mr. Grafton*, and the defendants, *J. W. Hinkley* and *Harry Powers*, as copartners under the firm name of Hinkley & Powers, wherein and whereby that firm agreed, in effect, to furnish all the material and perform all the work required in the construction and erection of a stone and brick seminary building for Grafton Hall at the place described, and do everything necessary and required to be done in, to, and about said stone and brick seminary building, according to the plans and specifications made for the same by Conover & Porter, architects, dated May 31, 1895; that all work should be executed in a thor-

ough, complete, and most workmanlike manner, and agreeable to such directions as might be given from time to time by the architects and superintendents, through their local superintendent or such person as might be employed by *Mr. Grafton* to superintend the work, and to such superintendent's full and entire satisfaction, without reference thereon to any other person; that, if any alteration should thereafter be made by orders of *Mr. Grafton* or the superintendents, which they might deem necessary, varying from the plans or specifications, either by adding thereto or diminishing therefrom, or otherwise however, such alterations should not vacate the contract thereby entered into, but the value thereof should be ascertained by said superintendents, and added to or deducted from the sum of money thereinafter mentioned, as the case might be; nor should such alterations, either in addition, diminution, or otherwise, supersede the condition for the completion of the whole of the work at the time therein expressed, but Hinkley & Powers should, if such alterations, of whatever sort, required it, increase the number of their workmen, so that the same, as well as the work contained in the plans and specifications, should be completely finished, and so delivered up to *Mr. Grafton*, clean, and in good order for use, inclosed, by December 1, 1895, and finished, if so ordered, April 1, 1896; that all matters of difference between the parties should be judged of, determined, and adjusted solely by the superintendents; that if Hinkley & Powers should neglect or refuse to carry on the work with such dispatch as should be thought necessary by the superintendents to complete the same by the time therein mentioned, or should neglect or refuse to furnish such material for or to do the work as by the superintendent directed, it should be lawful for *Mr. Grafton* or his superintendents to employ such other person or persons as he should think fit or necessary to furnish such unprovided material, or to finish any of the unfinished work,

after having given notice in writing to Hinkley & Powers in the manner therein prescribed; and the bill or bills for any artificer that might be employed, or for materials furnished, and all expenses incidental thereto, should be deducted out of any money that might be due or to become due on the contract, and owing to Hinkley & Powers, or any part thereof, as the case might be; and, in case of a deficiency, Hinkley & Powers and their sureties should be held liable therefor; that all payments made on the work during its progress were to be on account of the contract, and should in no case be construed as an acceptance of the work executed and materials furnished, and that Hinkley & Powers should be liable to all the conditions of the several agreements until the work should be completed and accepted as finished; that no part of the work covered by the contract was to be relet or subcontracted without the consent in writing of *Mr. Grafton;* that in consideration of the faithful performance by Hinkley & Powers, as above stated, *Mr. Grafton* agreed to pay Hinkley & Powers, on the certificate of the superintendents, $30,373, to be paid in the manner therein stated; that no material should be estimated or paid for until wrought into the construction of the building; that, unless notified in writing to complete the work on or before October 1, 1895, the work under the contract should be terminated with inclosing the building as specified in the specifications or modifications attached, and the settlement made upon the basis of the amended propositions of Hinkley & Powers and Joseph Hutter.

At the time of the execution of such contract,—June 1, 1895,—the contractors, Hinkley & Powers, as principals, and the defendants *L. D. Hinkley* and *M. J. Althouse*, of Waupun, as sureties, under their respective hands and seals executed a bond to the plaintiff in this action in the penal sum of $20,000, to be paid to *Mr. Grafton*, for which payment well and truly to be made they thereby bound them-

selves, their heirs, executors, and administrators, jointly and severally. The condition of the obligation was such that, if Hinkley & Powers should well and faithfully perform all of the conditions contracted to be performed by them as by the terms of said contract stipulated, without fraud or delay, and should pay all bills for labor and material incurred therein, then such bond to be void and of no effect; otherwise to remain in full force and virtue.

On June 7, 1897, Hinkley & Powers commenced an action against a corporation known as Grafton Hall, to enforce a lien for work, labor, and materials furnished under such contract against the seminary building so contracted for; and the judgment entered in that action in favor of of Grafton Hall was affirmed by this court. *Hinkley v. Grafton Hall*, 101 Wis. 69–76. On December 31, 1897, *Mr. Grafton* commenced this action for the breach of such contract against Hinkley & Powers and their sureties named in such bond. After alleging the making of the contract and bond, the complaint in this action alleged, in effect, that Hinkley & Powers entered upon the performance of such contract in June, 1895; that they continued the work and labor and the furnishing of material under the contract until October 31, 1896, when they declared that they had completed the building, and refused to do anything more thereon; that in truth and in fact Hinkley & Powers had not completed the building in several particulars alleged, as they well knew and were notified in writing by such superintendents; that *Mr. Grafton* was damaged by reason of such failure in the sum of $487.80, the reasonable costs and value of finishing the building; that, in addition to such damages, there were at the time Hinkley & Powers so refused to complete the building outstanding bills for lumber, labor, and material incurred by them in their construction of the building amounting to $1,903.59, no part of which had been paid by them, and that the plaintiff herein had

been compelled to pay and discharge the same, as follows: $1,751.73 to Moore & Galloway Lumber Company, for materials, as therein stated; $230 to Fond du Lac Implement Company, as therein alleged; and also $52.15, as therein alleged,— making the gross sum $2,033.88.

The sureties separately answered by way of admissions, denials, and counter allegations, and, among other things, alleged, in effect, that the contract of Hinkley & Powers terminated October 1, 1895, by reason of *Mr. Grafton's* failure to notify these defendants, or either of them, on or before that date, that Hinkley & Powers should complete the contract, and that by such failure of *Mr. Grafton* to give such notice in writing they were released as such sureties. Hinkley & Powers also answered by way of admissions, denials, and counter allegations; and, among other things, alleged a counterclaim for extra work, material, labor, and services by reason of change in plans and specifications, made at the special instance and request of *Mr. Grafton*, which were reasonably worth $2,147.37, no part of which had been paid, and for which they demanded judgment. The plaintiff, by way of reply, put in issue the counterclaim; and also pleaded the judgment in favor of Grafton Hall in the action brought by Hinkley & Powers to enforce a lien against that corporation, as stated.

At the close of the trial the court held that there was no question to go to the jury; that the plaintiff was entitled to judgment as prayed for in his complaint; and thereupon the court made findings of the undisputed facts as stated, and conclusions of law to the effect that Hinkley & Powers waived the giving of the written notice of October 1, 1895, provided for in the contract, and accepted in lieu thereof parol notice; that such waiver in no wise changed the rights or liabilities of the parties to the contract, nor of the sureties who signed the bond; that the sureties remained personally liable upon the bond after such waiver of written

notice and acceptance of parol notice, the same as before; that the plaintiff was entitled to recover the amount prayed for in his complaint, with interest; that Hinkley & Powers were not entitled to recover upon their counterclaim, or any part thereof, by reason of such judgment in favor of Grafton Hall and the fact found that there had been no change in the relations of the parties to the subject matter since.

From the judgment entered thereon accordingly *Hinkley* and *Powers* and the sureties separately bring these two appeals.

For the appellants there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*. To the point that the failure to serve the written notice to complete the work released the sureties, they cited *Stephens v. Elver*, 101 Wis. 394; *Cowdery v. Hahn*, 105 Wis. 455; *Miller v. Stewart*, 9 Wheat. 680; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Gillet v. Rachael*, 9 Rob. (La.), 276; *Truesdell v. Hunter*, 28 Ill. App. 292; *Douglass v. Reynolds*, 7 Pet. 113; *McCluskey v. Cromwell*, 11 N. Y. 598; *Gates v. McKee*, 13 N. Y. 234; *Strong v. Lyon*, 63 N. Y. 174; *Smith v. Lockwood*, 34 Wis. 72; *Nichols v. Palmer*, 48 Wis. 111; *Sage v. Strong*, 40 Wis. 575.

Edward S. Bragg, for the respondent.

CASSODAY, C. J. Before the plaintiff had rested his case, and during the cross-examination of Mr. Conover,— one of the architects mentioned, and a witness on the part of the plaintiff,— the trial court ruled that the judgment in the lien suit in favor of Grafton Hall was conclusive, not only on the firm of Hinkley & Powers, but also on their sureties, two of the defendants in this action. In pursuance of such ruling, that court struck out all such cross-examination as related to the alleged counterclaim of Hinkley & Powers, and also excluded all evidence as to such counterclaim. The important question here presented is whether the judgment in the lien action is *res adjudicata* upon all the defendants in this

action. That action was brought by Hinkley & Powers on the theory that their contract with *Mr. Grafton* terminated December 1, 1895, by reason of his failure to give written notice on or before October 1, 1895, mentioned, and the complaint alleged two causes of action. The first was that at that time there was due to them from *Mr. Grafton* $1,132.93 for materials furnished and services rendered under the contract, and the second was for a balance of $3,955.45 for services rendered and materials furnished between January 21, 1896, and October 31, 1896,— not under the contract, but for what the same were reasonably worth; and the action was to enforce both claims as a lien upon the building, then and since owned by a corporation known as Grafton Hall. The action was against the corporation alone, and the defense was that all the materials so furnished and all the services so rendered by Hinkley & Powers were under the contract, which they had failed to perform, and hence that they were not entitled to such lien; and the trial court so held, and its judgment was affirmed by this court. *Hinkley v. Grafton Hall*, 101 Wis. 69. Of course, the corporation Grafton Hall merely defended against the enforcement of such claims as liens against the building. Since Grafton Hall was not a party to the contract, it is obvious that Hinkley & Powers could not, and did not attempt to, recover any personal judgment against the corporation for extras, or deficiency, or anything. It is equally obvious that Grafton Hall, in that action, could not and did not attempt to recover from Hinkley & Powers any damages for a breach of the contract to which it was not a party, by way of counterclaim or otherwise. *Mr. Grafton* was not a party to that action, and, of course, any claim he might have had against Hinkley & Powers for damages for the breach of his contract with them could not be determined as against him in that action, and no attempt was made to have the same determined in that action. Since such claim of *Mr. Grafton* for

such damages could not have been determined in that action, it follows that the liability of Hinkley & Powers and their sureties on the bond could not have been determined in that action. True, the question whether Hinkley & Powers were entitled to a lien on the building depended upon the question whether they had or had not broken their contract with *Mr. Grafton;* and hence the question whether Hinkley & Powers had breached such contract to the extent of defeating such lien was involved in that suit, and the question of such breach is involved in this suit. But we are constrained to hold that such judgment is not conclusive upon the sureties on the bond upon which this action is brought. They were not parties to that action.

At common law a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, is not concluded by its determination. *Thomas v. Hubbell*, 15 N. Y. 405; *S. C.* 35 N. Y. 120. In that case it was held on the first appeal that "except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to indemnify his principal against the result of a suit, or when he is made a privy to the suit by notice, an opportunity to defend being given to him, a judgment against the principal is proof against the surety *only of the fact of its recovery*, and not that the facts *in pais* against which the surety agreed to indemnify were established in the litigation." And on the second appeal it was held that "the sureties on a deputy sheriff's bond are not concluded by a recovery against the sheriff, where they have had no opportunity to appear and defend." See, also, *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275. In this state it has been held "that one not a party, nor in privity with a party, to an action, is not bound by the judgment unless he had not only notice of such action, but also *an opportunity to defend it.*" *Saveland v. Green*, 36 Wis. 612. See, also, *De Greiff v. Wilson*, 30 N. J.

Eq. 435; *Smith v. Milwaukee*, 18 Wis. 369; *Somers v. Schmidt*, 24 Wis. 417, 421; *McCoy v. Quick*, 30 Wis. 521, 527; *Stephens v. Shafer*, 48 Wis. 54. It is true that soon after the commencement of the lien suit the corporation served notice on the sureties of the pendency of the action and their liability for Hinkley & Powers's breach of the bond; but the amount of such liability was not determined in that suit, to which neither they nor *Mr. Grafton* were parties, and they had no opportunity to defend against the same. Had *Mr. Grafton* been made defendant in the lien suit, and interposed a counterclaim for damages by reason of the breach of contract alleged in this action, and the sureties then been notified, a different question would have been presented. Here the condition of the bond sued upon is that if Hinkley & Powers "shall well and faithfully perform all the conditions contracted to be performed by [them] as by the terms of said contract stipulated, without fraud or delay, and shall pay all bills for labor and material incurred therein, then this bond to be void and of no effect; otherwise, to remain in full force and virtue." The rule is different where a surety has contracted with reference to the conduct of one of the parties to a suit or proceeding in court. In such cases it has often been held that the surety is concluded by the judgment against the principal. *Smith v. Lockwood*, 34 Wis. 72; *Shepard v. Pebbles*, 38 Wis. 373, 378; *Kellam v. Toms*, 38 Wis. 592; *Krall v. Libbey*, 53 Wis. 292; *Meyer v. Barth*, 97 Wis. 352; *Roberts v. Weadock*, 98 Wis. 400, 405; *Ingersoll v. Seatoft*, 102 Wis. 476, 480. In such cases the statute, in connection with the contract, contemplates proceeding in court and judgment. Mr. Freeman points out the same distinction, and the great confusion among the adjudications of different states on the subject. 1 Freeman, Judgments, § 180.

Counsel further contend that the sureties were released from liability on the bond by reason of the failure of *Mr.*

Grafton to notify them or Hinkley & Powers, in writing, on or before October 1, 1895, to complete the work on the building. There is nothing in the contract requiring such notice to be served on the sureties. In the former case we held that such provision in the contract "was apparently made for the sole benefit of *Mr. Grafton*," and that, as Hinkley & Powers did not exercise their privilege of quitting the job by reason of such failure to give such notice, and as "*Mr. Grafton* made no objection to their continuing work under the contract," but, on the contrary, "acquiesced in and consented to such continuance," such written notice was waived; and that all services rendered and materials furnished thereafter by Hinkley & Powers were under the contract. In other words, we held, under the circumstances stated, that the contract continued, and covered the whole job, and was binding upon the parties, the same as though such notice in writing had been given. In this case it was found by the trial court that such written notice had been waived by Hinkley & Powers, and parol notice accepted by them instead thereof; and that all work and labor done and all materials furnished by them were so done and furnished under the original contract and subject to its limitations, specifications, and conditions, and not otherwise; and that such waiver did not increase, change, or alter the responsibility of the sureties, and in no wise changed the contract nor the liability intended to be entered into and assumed by the sureties when they executed the bond. Of course, all concede that sureties for the performance of a contract are discharged by any subsequent material change therein. *Sage v. Strong*, 40 Wis. 575; *Nichols v. Palmer*, 48 Wis. 110; *W. W. Kimball Co. v. Baker*, 62 Wis. 526; *Cowdery v. Hahn*, 105 Wis. 455. In the case at bar there was no material change in the contract. The liability of the defendants on the bond is predicated wholly on the failure of Hinkley & Powers to perform the contract and pay all

bills as required. It contains no reference to the termination of the contract by the failure to give such written notice, nor to any omission to act on the part of *Mr. Grafton*. In a case in the supreme court of the United States upon a written guaranty of a contract to furnish machinery, the contractors had informed the other party of their liability to complete the work "by the first safe and navigable rise of the river," as required by the contract; and Mr. Justice CAMPBELL, speaking for the whole court, said:

"It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as, in effect, to make a new contract without the surety's consent, to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain." *Benjamin v. Hillard*, 23 How. 149, 165, 166.

Such rulings have been sanctioned by the late decisions in the federal court. *Harper v. National L. Ins. Co.* 56 Fed. Rep. 281, 284; *Fertig v. Bartles*, 78 Fed. Rep. 866. In this last case it was held that "a surety is not released from his obligation by the voluntary extension to his principal of a credit greater than that for which the surety has agreed to become bound, when no change is made in the terms of the contract between the principal and his creditor." In a late case in New York notice was given to terminate a building contract, as therein provided, on the contractor's failure to perform. Soon after, the owner recalled the notice and allowed the contractor to resume work; and, on a second failure to perform, the owner took possession as provided by the contract, and it was held that the effort at performance after the recall of the notice was not to be deemed a new contract,

so as to relieve the surety of the original contract from subsequent liability, since, under the terms of the contract, such notice did not, of itself, terminate the contract, and the owner had the power to recall it, and the contract was actually terminated *only by the owner's taking possession* on the contractor's final failure to perform. *Smith v. Molleson*, 148 N. Y. 241. In that case it was further held that "when a building contract provides that payments shall be made upon certificates of work done, the fact that payments were made without the certificate does not constitute a change in the position of a surety for the contractor to his prejudice, and so operate his release, when it is manifest that the provision was inserted in the contract for the benefit of the owner alone, and that the payments so made were not greater in amount than they should have been if the certificate had been exacted." See, also, *Ulster Co. S. Inst. v. Young*, 161 N. Y. 23; *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17.

In a recent case this court has held that "a surety for the performance of a contract will be released from liability by a change or alteration of such contract without his consent only when such change is material and substantial." *Stephens v. Elver*, 101 Wis. 392. In that case Mr. Justice BARDEEN quotes approvingly a part of the language of Mr. Justice CAMPBELL above quoted. For other cases see his opinion. 101 Wis. 396–401.

The waiver of the written notice and the acceptance of parol notice in the case at bar did not enlarge or change the liability of the sureties. On the contrary, such liability remained the same as though such written notice had been given. Upon the trial of this case there was, apparently, a misapprehension as to the rights of the parties on both sides.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DODGE, J. I fully agree with the decision of the court that the judgment in this case must be reversed for the error of the circuit court in receiving in evidence and treating as *res adjudicata* against the defendants the judgment rendered in an action to which the present plaintiff, *Charles C. Grafton*, was not a party, either in form or by representation. As such judgment could not estop him, it cannot be invoked as an estoppel in his favor without ignoring the rule that estoppels must be mutual.

I find myself unable, however, to reach the further conclusion of my brethren that the defendant sureties are bound for that portion of the building contract which, according to its terms, was to be performed only after, and upon the condition of, the giving of a written notice by the plaintiff declaring his option to that effect. The contract, as originally made, absolutely bound Hinkley & Powers to perform certain work amounting to about $14,000. It provided that they might become bound to perform additional work to the extent of about $16,000 upon the happening of a specified contingency, namely, the giving of a written notice. This contingency never happened, and therefore I cannot persuade myself that the sureties ever became bound. They had a right to insist on the strict letter of their contract, and neither *Grafton* nor Hinkley & Powers had any right to waive any of its provisions. Even if it were necessary that the court should discover the materiality of the requirement that Hinkley & Powers should be bound for the additional work only upon the giving of written notice, I think it would not be difficult to do so. Anything which facilitated Hinkley & Powers in the performance of their contract, or added certainty to their position, was material and beneficial to the sureties. So long as there did not exist a written notice signed by *Grafton*, the question of his liability for this additional work must depend upon the ability of Hinkley & Powers to prove his assent by parol.

Thus, during a period of many months, while the work was progressing, the position of the contractors with reference to procuring credit was weakened. It depended upon their own assertions that *Grafton* was liable to them, instead of being supported by written evidence of such liability. The sureties had a right to provide in advance that they should not be liable unless this written evidence was furnished, just as they would have had a right to stipulate in a bond that they should become liable only in case a written contract were made between their principal and the owner of the property. In such case I think none would contend that they could be bound to an oral contract.

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CARPENTER, Appellant, vs. MEACHEM, Respondent.

May 22 — June 20, 1901.

Mortgages: Foreclosure: Parties: Deficiency: Former adjudication: Election of remedies: Fraud.

1. In an action to foreclose a mortgage an intermediate purchaser of the land, who had assumed to pay the mortgage debt, was named as a defendant, but the summons was not served upon him. *Held* that, as he was not in fact a defendant in that action, a judgment for deficiency rendered against him therein was invalid and was not a bar to a subsequent action against him to recover the deficiency.
2. An attempt, in a foreclosure action, to obtain a binding judgment for deficiency against one who had assumed payment of the mortgage debt, which failed because he was not served with process, was not the election of a remedy inconsistent with a remedy by subsequent action at law against him upon the mortgage note.
3. Failure to serve the summons in a foreclosure action upon a nonresident intermediate purchaser of the land is not fraudulent, where the proceedings are carried on with all the publicity required by the statute.

Carpenter vs. Meachem.

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action to recover a deficiency arising upon the foreclosure of two mortgages, the defendant being an intermediate purchaser of the mortgaged property, who, it is alleged, assumed and agreed to pay the mortgage debt. The complaint set forth the execution of the two notes and accompanying mortgages upon real estate amounting in all to $6,000 by one Meyer to the plaintiff, and further alleged that thereafter the defendant, *Meachem*, purchased the mortgaged premises from Meyer, and accepted a warranty deed thereof, by which he assumed and agreed to pay the entire mortgage debt as a part of the purchase price; that said mortgages were duly foreclosed by action prior to the commencement of this action, and the property sold, and that a deficiency of $1,088.55 existed after the proceeds of said sale had been applied upon the mortgages; that the defendant, *Meachem*, was at all times a nonresident of Wisconsin, and no jurisdiction could be or was obtained in the foreclosure action to render a valid judgment against him. Judgment for such deficiency, with costs and interest, was demanded.

The answer of the defendant admitted the execution of the notes and mortgages described in the complaint, and the conveyance of the real estate to the defendant; also the institution of the foreclosure action, and the judgment and sale in foreclosure, and the fact that a deficiency of $1,088.55 existed, as shown by the report of sale. The answer also admitted that the defendant was at all times during the progress of said foreclosure action a nonresident of the state of Wisconsin. The answer then proceeded to allege affirmatively the rendition of said foreclosure judgment, and stated that the defendant herein was one of the parties defendant in said foreclosure action, and that judgment for deficiency was rendered in said action, which judgment is alleged to

be a bar to the prosecution of the present action. The answer further alleged that no summons, pleadings, or notice of any kind was ever served upon him, or published in any newspaper, and that no service by publication or otherwise was made upon him, and that the plaintiff fraudulently prosecuted said action to judgment without notice to the defendant, in order that he might bid in the premises at less than their real value, and so prevent the defendant from protecting his rights at the foreclosure sale; and that the plaintiff did bid in said premises at a grossly inadequate price, and thereby defrauded the defendant.

To that part of the answer which set up the rendition of the deficiency judgment as a bar and attempted to defend upon the ground of fraud, the plaintiff demurred on the ground that no defense was stated thereby; and from an order overruling said demurrer the plaintiff appeals.

For the appellant there was a brief by *Sallade, Chadbourne & Noyes*, attorneys, and *D. D. Sutherland*, of counsel, and oral argument by *F. W. Chadbourne.*

For the respondent the cause was submitted on the brief of *Charles M. Baxter*, attorney, and *Maurice McKenna*, of counsel.

Winslow, J. In that portion of the answer which is challenged by the demurrer the defendant attempted to allege by way of affirmative defense a former adjudication upon the same cause of action in bar, as well as a supposed fraud committed by the plaintiff in concealing from the defendant the fact of the pendency of the foreclosure proceedings. The insufficiency of the allegations to make out either of the supposed defenses seems quite plain. In order to constitute a previous adjudication a bar, it must have been rendered by a court of competent jurisdiction, upon the same cause of action, and in an action between the same parties, their privies, or representatives. The defendant could have been

made a party to the foreclosure action, and a judgment obtained against him for any deficiency arising upon the foreclosure sale. Stats. 1898, sec. 3156; *Palmeter v. Carey*, 63 Wis. 426. Such judgment, if rendered, would have been upon the same cause of action here sued on, and, if the record showed service of the summons upon the defendant, would have been a prior judgment between the same parties. But the difficulty is that the answer affirmatively shows that the summons in that action was never served upon the present defendant. It must necessarily be inferred that the record in that action corresponds with the truth, and that it affirmatively appears therefrom that no service was made upon the defendant, and hence that no jurisdiction was obtained over him, or, in other words, that he was not in fact a defendant in that action, and the judgment rendered therein was not a judgment between the parties to the present action. This consideration is conclusive upon this point. It demonstrates that there has been no previous judgment between the parties, notwithstanding the fact that the defendant may have been named as a party in the title of the action.

It appears by the opinion of the trial judge, which is returned with the record, that he considered the case as one where the doctrine of election of remedies might be applied, and that, it appearing by the answer that the plaintiff had elected to obtain a deficiency judgment against the defendant in the foreclosure action, he was, by that act, prevented from afterwards seeking relief in an action at law, notwithstanding he had obtained no valid judgment in the foreclosure action. The doctrine of the election of remedies is well understood, and it is well settled that the election, when once made in a proper case, is final and cannot be reconsidered. *Carroll v. Fethers*, 102 Wis. 436. But the doctrine of election is confined to cases where the plaintiff is required to choose between two remedies which are incon-

sistent with each other, such as a remedy in tort and a remedy in contract. 7 Ency. of Pl. & Pr. 362; *Fuller-Warren Co. v. Harter*, 110 Wis. 80. The plaintiff has not attempted to invoke two inconsistent remedies. The remedy by judgment for deficiency in the foreclosure action is perfectly consistent with the remedy by judgment in an action at law upon the notes. One remedy is by action in equity, and one by action at law, but both affirm and seek to enforce the written contract upon the same grounds. So it is apparent that the unsuccessful attempt to make the defendant a party to the foreclosure action, and bind him by the judgment therein, is no bar to the present action, either by way of former adjudication or by way of election of remedies.

The defense of fraud in the foreclosure of the mortgage by purposely concealing from the defendant the fact of the pendency of the foreclosure action seems not to have been considered as of any importance by the trial judge, and is not even mentioned in the opinion filed by him. It is, however, relied upon by the defendant in his brief in this court. The defendant was, as shown by the pleadings, an intermediate purchaser, and at all times a nonresident. The only fraudulent act alleged is that he was not served with the summons. He was not a necessary party to the foreclosure. The plaintiff could make him a party or not, as he chose. In not serving the summons upon him, the plaintiff simply exercised a legal right, and it is difficult to see how a charge of fraud can be predicated thereon. So far as the answer shows, every step in the foreclosure proceedings was carried out with all the publicity required by the statute.

By the Court.— Order reversed, and action remanded with directions to sustain the demurrer.

CLARK, Respondent, vs. THE FRANKLIN FARMERS' MUTUAL FIRE INSURANCE COMPANY, Appellant.

May 22 — June 20, 1901.

Insurance: Lightning: Cause of loss: Court and jury: Instructions.

1. In an action upon an insurance policy to recover for the destruction of mill buildings, alleged to have been caused by lightning, it is *held* that the evidence (stated in the opinion) establishes that the undermining of the buildings by high water caused the loss, and that the circumstances (including the facts that a small portion of roof and a few shingles were found above where the water had reached, and that some of the timbers were badly broken and splintered, though without marks of fire) relied upon to show that lightning was the cause furnished only a slight basis for speculation and conjecture and did not warrant the submission of the case to the jury.
2. An instruction in such case containing the suggestion, not warranted by evidence, that the directors of the insurance company were uncertain as to whether lightning caused the loss or not, and hence that it was proper for them to submit the matter to a jury, is *held* erroneous.

APPEAL from a judgment of the circuit court for Richland county: B. F. DUNWIDDIE, Judge. *Reversed.*

Action on an insurance policy to recover for loss alleged to have been caused by lightning. The property insured was a gristmill and sawmill operated by water power. The sawmill had been out of use for some years before the loss occurred. The dam extended across the river at right angles from east to west. The river turned southeasterly below the dam, and the westerly banks thereof were precipitous rocks. Above the dam on the east side of the stream was a structure called the "old mill," on the south side of which and attached thereto was an addition called the "annex" running the whole length thereof. The west end of the mill and annex was supported by posts set on mudsills imbedded in the bottom of the pond at the easterly edge thereof.

Such posts were planked up from the top of the mudsills to a sufficient height to prevent water from flowing out of the pond and under the mill. In such protection planking a bulkhead was located through which water was formerly taken to run the sawmill. There were two gates at this point which were used, when necessary, as waste gates. There were ten or eleven other waste gates located in the dam. A few feet south of the annex was the north side of the gristmill, which was built in two parts, the west part being what was called the "old mill," and the east part the "new mill." The north side of the gristmill coincided with the north side of the dam. On the west side of such mill was the gristmill flume. The old mill was over the water and supported on posts. The new mill was attached to the old mill on the east side and was all on the bank of the stream. The wasteway for the water from the gates at the sawmill was under the old part of the gristmill and about fifteen feet wide, it being planked at the bottom and on the east and west sides.

At the time of and before the loss occurred, four gates in the dam were open, two near the east side and two near the west side thereof. The gates had been up a sufficient length of time to substantially empty the pond, except what was retained by the deadhead of the dam. On June 11, 1899, at or before twelve o'clock at night, a severe rain storm commenced, which lasted for several hours and was accompanied by unusually powerful electrical disturbances. About two o'clock on such night there was a very sharp flash of lightning, followed immediately by a loud report, indicating that lightning had struck near by and in the vicinity of the mill. In a minute or so a noise was heard coming from the direction of the mill, as of the falling and crashing of a building, which noise lasted for some time. In the early morning hour the water in the river was quite high, the banks being full to overflowing, above and below the dam.

Thereafter the water was much higher. The new part of the gristmill and all of the annex except a small part thereof at the end furthest from the pond, were gone, and lay in broken and disorganized heaps of material at various points from twenty to forty rods below the dam. Timbers were broken and splintered, but there were no marks of fire on any part of the wreckage or on any of the remaining portions of the building. There were some shingles and a small portion of the roof near the mill site above where the water had reached. The bulkhead at the west end of the sawmill was gone and the water had made for itself a new channel southeasterly under the sawmill and through the territory where the annex and the new part of the gristmill were formerly located, of a sufficient width and depth to draw thereto, mainly, the water of the river, there being a strong current setting into and through such new channel and out of it to the natural bed of the stream south of the dam. The water had carried out the foundation of the east part of the gristmill and the bank which the same formerly rested upon, to a considerable depth, and was still beating against and eating away such bank. The situation was such that if the action of the water mentioned occurred before the destruction of those portions of the buildings which had fallen and disappeared, that result was not only a natural and probable but it was a necessary result of such action.

At the close of the evidence the court submitted the case to the jury to say whether the loss was caused by lightning as alleged, saying, among other things, that since it was doubtful in the minds of the directors of defendant whether the loss was so caused or not, it was proper for them to submit the matter to a jury for a decision of the question. The instruction in that regard was duly excepted to by defendant's counsel. The jury found for plaintiff. There was no question as to the amount of the loss. Defendant's counsel, by proper motions at proper times, insisted that there was

no evidence to warrant a finding in plaintiff's favor. Judgment was rendered upon the verdict.

F. W. Burnham, for the appellant.

For the respondent there was a brief by *L. H. Bancroft* and *W. S. McCorkle*, and oral argument by *Mr. Bancroft*.

MARSHALL, J. The burden of proof was on respondent to establish by a preponderance of the evidence, to a reasonable certainty, that the destruction of the buildings was caused by lightning. To merely prove that they might have been so destroyed and that they might just as likely have been destroyed by water, or to prove the existence of circumstances which were merely sufficient to constitute a foundation for speculation and conjecture, was not sufficient to warrant a recovery by plaintiff. *Hyer v. Janesville*, 101 Wis. 371. 'Judicial determinations must rest upon facts, and legal liability must be determined by the law in application to facts. That does not exclude circumstantial evidence, for such evidence is often the strongest, but it must establish facts.' *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338. In this case the situation on the morning after the loss, irrespective of the fact that a small portion of the roof of one of the buildings and a few shingles were beyond where water had reached and the fact that some of the material of the buildings was so badly broken and splintered as to indicate application directly thereto of great force, was such as to furnish a perfect explanation of the cause thereof. As indicated in the statement, the foundation of those parts of the buildings which disappeared and those parts that remained partially in place, had been so disturbed as to render what had occurred to such buildings not only a perfectly natural and probable but a necessary result thereof. If a portion of a roof and a few shingles were deposited on the bank of the stream a little way from the site of the mill, as testified to by the plaintiff, it is much more

probable that the cause thereof was wind than that it was lightning. The circumstance that a board that was standing in the mill against the side thereof was broken, is too trifling to be considered. The splintered condition of some of the timbers, testified to, and that of the material of which the buildings were composed, as such material was found after the loss occurred, is much more reasonably accounted for by the fall of the structures from their supports, the tearing away thereof from the structures that remained, and the collision of the floating wreck with the rocks on the westerly side of the stream, than by lightning. The natural course of the water, as it passed from the new channel into the natural bed of the stream, was southward against the rocky bank before described. The wrecked portions of the buildings must have been carried by the water with great force against such rocks and been pressed and ground against them while passing rapidly southeasterly around the bend in the stream for a distance of twenty rods or more to where the same finally lodged. There were no marks of fire anywhere, such as are customarily found where lightning has come in contact with dry wood. On the whole, we are unable to see any justification in the evidence for the finding that the buildings were destroyed by the latter cause. The evidence is strongly the other way. It establishes so clearly that the undermining of the buildings by water caused the loss complained of, that the circumstances relied on to show that lightning was the cause at best furnish only a slight basis for speculation and conjecture. The judgment must be reversed for that reason.

Courts and jurors are expected to view evidence in the light of reason and common sense, and not say officially that a fact may or does exist which they would otherwise say does not. The mere fact that a claim is made and evidence is produced in an attempt to sustain it, does not warrant the submission of an issue in regard thereto to a jury

for determination. In this case a verdict should have been directed in favor of the defendant without hesitation.

It is considered that the instruction to the jury that it was proper for the directors of the appellant to submit the controversy to a jury for determination since they, the directors, were uncertain as to the cause of the loss, was wholly unwarranted. There was nothing in the evidence or the conduct of appellant or its counsel upon the trial to indicate that there was any such uncertainty on their part. On the contrary it clearly appeared that they attributed such loss to the action of the water from first to last, and that, at every stage of the trial where it was proper to do so, it was insisted that there was no evidence to establish the claim of plaintiff that the loss was caused by lightning. The suggestion of the court that appellant's directors were uncertain as to whether lightning caused the loss or not, under the circumstances, quite likely was prejudicial to appellant.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CHASE and another, Respondents, vs. DODGE, Appellant.

May 22 — June 20, 1901.

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Action: "Real party in interest:" Colorable transfer of claim: Agency: Evidence: Instructions to jury.

1. The assignee of a claim, holding the legal title by a transfer valid as against his assignor, is the "real party in interest" and the proper party to sue thereon, under sec. 2605, Stats. 1898; and the fact that such transfer is colorable only is immaterial unless the rights of creditors are involved or the right to interpose some defense or counterclaim supposed to be cut off by the assignment.
2. In an action upon accounts for goods claimed to have been sold to defendant through two persons, severally, who were alleged to have been his agents, the evidence as to the agency of each was

different, and the fact of the agency or nonagency of one had no bearing upon the accounts incurred by the other. *Held*, that it was confusing and therefore error to charge the jury that if defendant authorized said persons "or either of them" to secure the goods, or if he held them out, "or one of them, as his agents or agent to incur these debts, or some of them," they must find for plaintiffs.

APPEAL from a judgment of the circuit court for Crawford county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

Plaintiffs sue to recover for a bill of merchandise alleged to have been sold defendant through his agent Miller. They also claim to be assignees of several accounts contracted under similar circumstances, except as to the account of P. T. Andrews. The greater portion of this account was incurred by one Martin, who was also claimed to be defendant's agent. The defendant answered by way of general denial.

During the progress of the trial the defendant obtained leave to amend his answer by setting up that as to the assigned accounts the plaintiffs were not the real parties in interest, and that said accounts were in fact owned by the persons who in fact sold the goods. The plaintiffs introduced in evidence formal written assignments of each account, and at the close of the testimony the court ruled that such assignments were valid and carried title thereto to plaintiffs, and refused to submit the matter to the jury.

The chief controversy arose over the question of whether Miller and Martin were in fact agents of the defendant, with authority to bind him for the purchase price of the goods mentioned in the several accounts. The jury found for the plaintiffs upon each of the accounts.

A motion to set aside the verdict and for a new trial resulted in the court entering an order granting the same unless the plaintiffs should remit therefrom the sum of $18.50, being the amount of the account of Joseph Brothers, assigned to them. This was done, and judgment was entered for plaintiffs for $120.85, with costs. The defendant takes

this appeal, and claims that the judgment should be reversed because the evidence shows plaintiffs were not the real parties in interest; because the evidence fails to show that Miller and Martin were defendant's agents; and because the court erred in his instructions to the jury.

For the appellant the cause was submitted on the brief of *O. B. Thomas.*

For the respondents there was a brief by *Graves & Mahoney* and *A. F. Drew*, and oral argument by *C. W. Graves.*

BARDEEN, J. 1. The rule that every action must be prosecuted in the name of the real party in interest, under sec. 2605, Stats. 1898, is imperative, but is satisfied when it is shown that the party suing is the one who has the right to control and receive the recovery. *Landauer v. Espenhain*, 95 Wis. 169. Our statute was taken from New York. In *Cummings v. Morris*, 25 N. Y. 625, it was said:

"If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it subject to all equities betweeen the assignor and third parties."

In a subsequent case (*Sheridan v. New York*, 68 N. Y. 30) the plaintiff sued on an assigned claim, and on the trial produced a written assignment, properly executed, in terms transferring absolutely, for a valuable consideration, the demand in suit. The trial court submitted to the jury the question of whether this was a sham transaction. The court disposed of the case in the following language:

"Precisely what the learned judge meant by a sham transaction, as applied to the transfer of the demand, is not very apparent; but I infer from this and other parts of the charge that he intended to charge that, although a legal title to the claim was transferred to the plaintiff and the as-

signment was valid as against the assignee, yet, if the jury believed that the transaction was colorable (that is, that by any private or implied understanding the transfer was not intended as *bona fide*, or an actual and real sale of the demand, as between the parties) the plaintiff could not recover. In this, with great respect, I think the learned judge erred. A plaintiff is the real party in interest, under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to or recovery by an assignee occupying this position is a protection to the defendant against any claim that can be made by the assignor."

This case was cited with approval in *Crowns v. Forest L. Co.* 99 Wis. 103, and settles the question against the contention of the defendant. The plaintiffs produced formal written assignments of the several claims sued upon, which were rightfully held to carry the title to the demands to them. Even if the court had submitted the question to the jury, and they had found that the transfer was only colorable as between the parties, yet that would constitute no defense on the ground that plaintiffs were not the real parties in interest. Such an inquiry might become material if the rights of creditors were involved, or upon the right of interposing some defense or counterclaim supposed to be cut off by the assignment. *Sheridan v. New York, supra.* No such considerations were presented in this case, and the trial court was manifestly right in refusing to submit the matter to the jury.

2. It is further argued that there is no proper evidence in the case establishing these claims against the defendant. We have carefully reviewed the record, and, without entering into a formal discussion of the many facts involved, we are convinced that there was sufficient evidence to submit to the jury on the question of whether Miller and Martin were held out as agents of defendant.

3. One of the facts made prominent on the trial was that

defendant had recognized Martin as his agent, and paid debts which he had contracted in getting out the staves. The defendant expressly denied that either Miller or Martin was employed to run camps for him. He further said that he had never authorized Miller to represent himself as his agent. All of the claims sued upon were incurred by Miller, except a portion of the Andrews claim, which was for goods delivered to Martin. The chief controversy was in reference to the goods obtained by Miller. The court repeatedly told the jury that if the defendant expressly authorized "Martin and Miller, or either of them," to secure the goods in controversy, they must find in favor of the plaintiffs. In like manner he told them that if the defendant, by his words or conduct, "held out Martin and Miller, or one of them, as his agents or agent to incur these debts, or some of them," he was responsible for the indebtedness thus incurred. The circumstances in relation to the two men named were not at all similar. With reference to Martin, the defendant had seemingly recognized his obligation to pay, or had in fact paid, some of the debts incurred by him. This fact did not necessarily establish the agency of Miller; hence, when the court, in the charge, placed them on the same footing, by the frequent use of the words "Martin and Miller, or either of them," he led the jury to understand that, if they found the facts stated with reference to either, a recovery for plaintiff would follow. This was not necessarily so; for there was evidence from which the agency of Martin might have been found and a contrary conclusion warranted with reference to Miller. The fact of Martin's agency or nonagency had no bearing upon the accounts which had been incurred by Miller. The fault of the court was in confusing the two situations and putting them on the same plane. The court should have singled out the circumstances with reference to each of the accounts sued upon, so that the jury might have considered them unembarrassed

by other considerations. In other words, the court should have told the jury that the plaintiffs' claim, and the other claims standing on the same footing, should be considered and determined with reference to the facts in evidence showing that Miller was defendant's agent. The failure to keep the two situations separate manifestly left the jury in confusion and is fatal to the judgment.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

DUNCAN, Respondent, vs. DUNCAN, Appellant.

May 22 — June 20, 1901.

111 75
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111 75
116 1 77

Appeal: Findings of fact: Evidence: Immaterial errors: Trusts.

1. The formal findings of the trial court in this case containing conclusions of law and being silent as to the real issue of fact litigated, but a written "decision" having been filed, signed "by the court," passing to some extent upon that issue, and the appellant having filed exceptions to various parts thereof, such decision is treated on appeal as a finding of fact.
2. One to whom land has been devised absolutely cannot be charged with a trust therein in favor of another, by parol evidence as to the testator's wishes, not showing that the execution of the will in that form was procured or induced by fraud.
3. In a case tried by the court a reversal cannot result from error in the admission of evidence.
4. A party who in his pleading expressly alleged that a will was duly admitted to probate cannot on appeal allege as error insufficiency of proof of the probate thereof.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Plaintiff, *James Duncan*, brought action in ejectment for the south half of a certain quarter section, alleging life estate in himself and withholding of possession by the de-

fendant, *David Duncan*. The answer denied the allegations of the complaint, and set up by way of counterclaim that plaintiff's title depended upon the will of Esther Duncan, the mother of both plaintiff and defendant, duly probated, by which an ostensible estate for life was given to *James Duncan*, but that its execution in that form was obtained by *James* by such promises on his part as to charge him with a trust in favor of the defendant for an undivided one-half. Jury was waived, the action tried to the court, and judgment rendered in favor of the plaintiff in accordance with the prayer of the complaint, from which defendant appeals.

From the appellant there was a brief by *Brennan & Howe* and *Leo Philipson*, and oral argument by *W. E. Howe*.

For the respondent the cause was submitted on the brief of *Lowry & Clementson*.

DODGE, J. Substantially the only question disputed in the evidence was whether the life estate of the entire quarter section, of which the south half was claimed to be wrongfully withheld by defendant, was devised to the plaintiff under such circumstances that his refusal to recognize defendant's undivided interest therein so constituted a fraud as to justify a court of equity in charging him with the trust. After the trial the court filed a written opinion, which he indorses "Decision." This was followed by formal findings, which are recited in the judgment as "the findings of the court." Those findings are entirely silent upon the issue of fact thus tried. They find that the plaintiff is the owner for life; that the defendant has no right of possession during plaintiff's life; that he wrongfully withholds possession; that the plaintiff is entitled to recover possession,—obviously all of them being more properly conclusions of law than a finding upon any issue of fact, and none of them touching the real issue above described. In the so-called decision, however, the circuit judge does pass to some ex-

tent upon the evidence as to the making of the will, and declares his conclusion that "the evidence in this case entirely fails to show fraud of any kind on the part of the plaintiff in procuring the will of his mother to be made as it was." This practice is extremely confusing, and leaves much doubt whether the court intended the so-called decision to be a compliance with the statutory requirement for a written decision stating separately the facts found and the conclusions of law therefrom, with which latter requirement it does not comply in form. Especially uncertain is it where he also files a formal document designated as such findings. Nevertheless, we cannot avoid the view that the so-called decision, duly signed "by the court," must be taken as declaring the judicial conclusion upon the facts, so far as any is stated therein. It has been so treated by the appellant, who has duly filed exceptions to the various parts thereof. So treating it, the circuit court has found that the will in its present form was in no way procured or induced by plaintiff; that he, on the contrary, urged testatrix not to make any devise to him to hold in any wise in connection with defendant; that no fraud of any kind on the part of the plaintiff in procuring the will to be made as it was is shown.

Examination of the evidence makes apparent abundant support for such findings,— certainly no preponderance against them,— and they must be accepted as verities. From them no conclusion other than that reached by the trial court can be deduced. The statutory prohibition against creation or proof of an express trust in land by parol is not to be evaded except in a clear case of the inducement of a conveyance omitting to declare such trust by such conduct and promises and under such circumstances of trust and confidence that fraud in so doing is apparent. *Fairchild v. Rasdall*, 9 Wis. 379; *Brook v. Chappell*, 34 Wis. 405; *Cutler v. Babcock*, 81 Wis. 195, 206; *Krouskop v. Krouskop*, 95 Wis. 296.

Errors are assigned upon the admission of certain evidence. The rule that reversal cannot result from any such errors in trials without a jury has now been established so long, and reiterated so frequently, that briefs ought not to be incumbered with such assignments.

Another error complained of is insufficiency of proof of the probate of the will conferring plaintiff's title. We do not examine the question on this appeal, because appellant in his answer expressly alleges that the "will was duly admitted to probate." No further proof of that fact was necessary.

By the Court.— Judgment affirmed.

McCord, Respondent, vs. Flynn, Appellant.
Same, Appellant, vs. Same, Respondent.

May 23 — June 20, 1901.

111 118 [1202]

Arbitration and award: Interest in land: Powers of arbitrators: Modification and correction of award.

1. An action having been brought for an accounting and to enforce an equitable claim to land under a contract by which plaintiff was to work for defendant upon a certain farm until it should be paid for by defendant and was then to receive a deed of one third of the farm, the parties submitted the controversy to arbitrators, and plaintiff, for the purposes of the arbitration, and finally if judgment should be entered on the award, waived all claim that such contract might give him to the farm and agreed to accept a money award only. *Held*, that such submission was not void under sec. 3545, Stats. 1898, which provides that "no such submission shall be made respecting the claim of any person to any estate in fee or for life to real estate."
2. The parties having further agreed, in the submission to arbitrators, that a judgment of the court in which the action was brought should be rendered upon the award, the arbitrators had power to order or determine that plaintiff should have judgment.

3. Where arbitrators have exercised, or attempted to exercise, their judgment upon the questions submitted to them, their award in respect thereto cannot be disturbed for mere error of judgment as to the law or the facts.

4. A contract provided that plaintiff should work for defendant upon a farm purchased by the latter until it should be paid for, and should then receive a deed of one third of the farm as compensation; also that all proceeds of the farm and all other lands owned by defendant, over and above the running expenses and the maintenance of defendant and his family and plaintiff, should be applied to payment for said farm. The respective claims of the parties under such contract were submitted to arbitrators, who determined that in an accounting defendant was not entitled to credit for services of his sister who lived with him as a member of his family. *Held*, that such determination was not subject to revision by the court.

5. But where such arbitrators, in making an award in plaintiff's favor of a sum intended to represent his interest in the farm, credited him with a share of fees received by defendant as town clerk during the continuance of the contract, the court properly modified the award by deducting the amount so credited, since that was a matter not covered by the contract nor submitted to the arbitrators.

6. As a general rule, after arbitrators have made and delivered their award they have no power to rejudge the case and alter such award; but the award may be corrected so as to allow one party a credit which by mere oversight the arbitrators at first omitted to allow; and an order of the court treating the award as so corrected will be regarded as an order so modifying it, under sec. 3558, Stats. 1898.

APPEALS from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed on defendant's appeal; modified and affirmed on plaintiff's.*

During the times mentioned the defendant was a cripple, without the use of his lower limbs, but was able to do considerable work, and was very useful on the farm. For several years prior to June, 1893, when the plaintiff became of age, he had lived with and worked for the defendant. About the time the plaintiff became of age he and the defendant entered into a parol agreement in relation to the Taylor

farm. In December, 1895, such agreement was reduced to writing, and signed by the plaintiff and the defendant, under their hands and seals, in the presence of two witnesses, who subscribed their names thereto as such. Therein it was recited, in effect, that in April, 1894, the defendant bought the Taylor farm, therein described, paying therefor $1,000 down, and agreeing to pay therefor the further sum of $1,700, according to the terms of four certain promissory notes, the last of which was to become due on or before April, 1899, and whereas the defendant had adopted the plaintiff, therefore, for and in consideration of the sum of one dollar, and for the further consideration of the premises therein, it was thereby mutually agreed and understood by and between the parties thereto that if the plaintiff should faithfully, and in good, husbandlike manner, work for the defendant in and about the cultivation and tillage of the lands described, and of the lands in addition thereto owned by the defendant, and do all such work as was generally done by a farm laborer, and should, in addition to his own labor, furnish the defendant with one good work team, from the —— day of April, 1894, until the defendant should fully pay for the premises described according to the terms and conditions of the notes given therefor, then upon demand of the plaintiff, and without further costs or charges to him, the defendant thereby bound himself, his heirs, executors, administrators, and assigns, to give to the plaintiff, his heirs or assigns, a good and sufficient deed of conveyance of the undivided one-third of all the lands so described, bought as aforesaid by the defendant of C. F. Taylor; and the defendant thereby acknowledged that the plaintiff had fully performed the work required of him by the terms of the contract, up to and including the —— day of April, 1894; that it was further mutually agreed and understood, by and between the parties thereto, that the plaintiff was to receive such deed for the one-third interest in the place in full for all work

and labor he should perform for the defendant, and was to receive no wages whatever, except as thereinafter set forth; that all the proceeds of the lands described and also all the other lands then owned by the defendant, over and above the necessary running expenses, and over and above the maintenance of the defendant and his family and the plaintiff, was to be applied upon and for the payment of the lands described; that the defendant thereby agreed and bound himself, his heirs, executors, administrators, and assigns, to give to the plaintiff, his heirs or assigns, at the time of the completion of the contract, and at the time of the delivery of the deed to the plaintiff, a bill of sale of one third of all the cattle then owned by the defendant over and above the number of cattle which were owned by the defendant on the —— day of April, 1894, and the parties thereto thereby agreed and fixed —— as the number of cattle owned by the defendant on the date last above mentioned, the division of which was to be made equitably, according to their age and quality.

The plaintiff and defendant continued to carry on the farms under such agreement until June 19, 1899, when, owing to a disagreement, the plaintiff left. On August 30, 1899, the plaintiff commenced this action for an accounting under such contract, and for a transfer to the plaintiff of one third of the personal property, and a conveyance to him of one third of the Taylor farm, according to the terms of such agreement.

The defendant answered, to the effect that the statement in such agreement that the last note for the Taylor farm would become due April, 1899, was a mistake; that it should have been May 19, 1900; that there was still due and unpaid on the Taylor farm $1,485; that the net earnings of both farms had been insufficient to pay for the Taylor farm into about $1,200; that the defendant had, during the time mentioned, received $60 per year as town clerk, and the

same had been applied towards the payment of the Taylor farm; that there were not more than ten head of cattle on the farm in excess of what he had in April, 1894, and they were not marketable, and if sold would not bring to exceed $250; that the plaintiff had failed to perform the contract on his part, and had always failed and neglected to furnish any work team as provided in the contract; that the plaintiff had been unsteady and unreliable, and ran away for a week in the spring of 1897, without the defendant's consent; that July 1, 1899, the plaintiff refused to longer work for the defendant, against the defendant's objection, and left in violation of his contract, to the great damage of the defendant; that the purchase price of the Taylor farm was $2,700, and the $1,000 paid down was borrowed, and had to be repaid; that the plaintiff had always had his board, clothing, and spending money, and had not been worth any more.

During the trial of the cause, and pursuant to a suggestion from the bench, on November 7, 1899, the plaintiff and defendant entered into an agreement, in writing, to submit the matters in controversy between them to arbitrators, which agreement, with the recitals therein, is to the effect that whereas, the contract upon which the action was based was made in December, 1895, but was intended to relate back to the time when the plaintiff became of age, in June, 1893, according to his contention, but according to the defendant's contention was only to relate back to September, 1893, the original of which was filed in the action with the clerk of the court, November 6, 1899; that the court having heard some testimony in the case, and having then from the bench suggested to the parties that it was a case that ought to be compromised by them without further litigation, and the parties to the action having agreed to submit their respective claims under said contract to two arbitrators, namely, Joseph T. Lance, of Crawford county, and Evor Christianson, of Waterstown, they to be the sole arbitrators in this matter,

and to be governed as such arbitrators by the provisions of ch. 153, Stats. 1898, it being a part of the submission that the plaintiff, *Andrew McCord*, waives, for the purposes of this arbitration, and finally if judgment be entered upon the award made by such arbitrators, all claims that such contract might give him to the Taylor farm therein mentioned, and to accept only a money award in his favor for such sum as, under such contract and the testimony given before them, such arbitrators shall determine he should justly receive; and that a judgment of the circuit court should be rendered upon the award made pursuant to this submission, and that said action then pending should remain in abeyance until said arbitrators should make their award and judgment should be rendered thereon, unless the court in this action, by its order, should otherwise provide; and that upon the rendition of said judgment said action should be abated and dismissed without costs to either party, and that the costs of the arbitration and incident thereto should be paid by the parties, or one of them, as the arbitrators might determine, and that the judgment upon the award should include costs in accordance with the determination of the arbitrators; such arbitrators to be sworn as provided by sec. 3547 in said ch. 153, and to be in all respects governed by the provisions of said chapter in their doings as arbitrators, and to be limited in what they do by the provisions of said chapter. It was further agreed, as a condition of such arbitration, that the witnesses to be sworn and examined before said arbitrators should be limited to six on each side, in addition to the parties to this controversy; that said arbitrators should meet for the purpose of qualifying, and for such further business as they might determine then to do regarding such arbitration. It further provided for the meeting of the arbitrators, and that a copy of such submission be sent to each of them. The arbitrators were duly sworn as thus required.

On December 27, 1899, the arbitrators made their award in writing, as follows (omitting title of the case):

"We, the undersigned arbitrators of the case above stated, did meet at the town hall in Boscobel on the 12th day of December, 1899, and did then and there proceed to hear the evidence offered by the plaintiff and defendant, both parties being present, and after carefully considering the evidence, and viewing the premises, stock, and improvements now in possession of the defendant, we find for the plaintiff, *Andrew McCord*, and determine that said plaintiff shall have judgment for ($1,092.17) one thousand ninety-two dollars and seventeen cents, and that the plaintiff and defendant shall each pay equal parts of all costs of this case, exclusive of attorney's fees.

"Dated December 27, 1899. J. T. LANE,
"Witness: EVOR CHRISTIANSON,
"Jennie Lance. Arbitrators."

Accompanying such award was a written explanation of the arbitrators, to the effect that, in settling the trouble between *Andrew McCord* and *Peter Flynn*, they found that the Taylor farm was then worth, and would sell for, $3,500 cash; that the stock, with the cash on deposit, would pay all the debts, including the debt on the farm, except $223.49, and as it was fairly understood by them that the design of both parties, as shown by the contract, was that *Flynn* should have two thirds, and McCord one third, of the profits of their investment, therefore they deducted $223.49 from the cash value of the farm, and divided the remainder ($3,276.51) by three, giving to *McCord* $1,092.17; that they considered that *Flynn* sustained a damage by *McCord* leaving him June 19, 1899, as the growing crop at that time of the year needed immediate care, therefore they allowed *Flynn* the improvements which had been placed upon his own farm,—a well, cellar, corncrib, and cow shed; this they decided would make good to *Flynn* all damages he sustained by *McCord's* leaving him; that they could not, under the contract, allow Kate Flynn anything, nor *Peter Flynn*

any clerk hire, as he claimed, for they believed the intention was for both parties to devote their whole time and energy to the paying for the farm; that they had finished their investigation, and made their award, and submitted the whole proceedings to the court, feeling that they had discharged their duty as arbitrators to the best of their ability. Signed by the arbitrators.

Six days after the making of such award the said arbitrators corrected the same in writing, to the effect that they had on that day discovered an error in the award, caused by an oversight, in which nine head of cattle which belonged to the defendant in 1894 were not counted to his credit; that said nine cattle they valued at $247.50 in the aggregate; and therefore they corrected the award by deducting one third thereof, being $82.50, which left the award, as corrected, $1,009.67.

On June 6, 1900, the court denied the plaintiff's motion to confirm the report and for judgment thereon in his favor, and also denied the defendant's motion to vacate and set aside the award; and thereupon the court further ordered that such award be, and the same was thereby, modified in this: that the sum of $100, being one third of the fees received by *Peter Flynn* as town clerk, credited to the plaintiff as a part of his interest in the earnings of *Peter Flynn*, be deducted from the interest the plaintiff had in the place or the proceeds thereof; that the sum of $131.67, being for one third of the value of Kate Flynn's services, and which sum was credited to the plaintiff as a part of his interest in the earnings of the defendant, *Flynn*, be deducted from the interest the plaintiff had in the place or the proceeds thereof; that the aggregate amount of the two sums, being $231.67, be deducted from the amount awarded to the plaintiff, as corrected, leaving the sum of $778 as the true amount, and that the plaintiff have judgment for that amount; that each party pay his own costs, and that no costs be taxed except those

of the arbitrators, stenographer, and the clerk of the court, which said costs are to be paid by the said parties in equal shares; that the said award be and the same was in all other things confirmed. From the judgment entered upon the award, so corrected and modified, both parties appeal to this court.

For the plaintiff there were briefs by *Palmer & Whitman*, and oral argument by *Platt Whitman*.

W. E. Howe, for the defendant.

CASSODAY, C. J. The defendant contends that his motion to vacate and set aside the award was improperly denied. The principal ground upon which such contention is based is that the plaintiff's claim for the specific performance of the contract for the purchase of the Taylor farm was not within the power of the arbitrators, even though formally submitted to them, and hence that the award thereon is void. One of the grounds for vacating an award prescribed by statute is "that the arbitrators exceeded their powers." Subd. 4, sec. 3552, Stats. 1898. The parties were expressly authorized by statute to submit to the arbitrators any controversy existing between them which was or might be the subject of a civil action, except as otherwise provided by statute. Sec. 3544. True the statute declares:

"No such submission shall be made respecting the claim of any person to any estate in fee or for life to real estate; but any claim to an interest for a term of years or for one year or less in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower may be so submitted to arbitration." Sec. 3545.

Under that statute it has been held by this court that arbitrators have no power to determine that a conveyance of land by deed which upon its face conveys an absolute fee shall only have effect as a mortgage. *Russell v. Clark*,

60 Wis. 284. To the same effect, *Lang v. Salliotte*, 79 Mich. 505. There is no question but that the defendant purchased and took a deed in his own name of the Taylor farm. The agreement was that the plaintiff should work for the defendant in cultivating and tilling the land, and finally receive a deed from the defendant for one third of that farm as part compensation for his services. The statutes cited were borrowed from New York, and in that state it has been held that they "forbid the submission of claims to an estate in lands, only where the controversy is as to the legal title, and not where the equitable title only is in dispute." *Olcott v. Wood*, 14 N. Y. 32. This court has held that an award of damages for the overflowage of land had been properly submitted to the arbitrators. *Wood v. Treleven*, 74 Wis. 577, 581. Under the contract in question, the plaintiff never had anything more than an equitable interest in the land. The action was brought for an accounting and to enforce such equitable claim to the land. In the agreement submitting the controversy to the arbitrators, the plaintiff "for the purposes of this arbitration, and finally if judgment be entered upon the award made by such arbitrators," waived "all claim that such contract might give him to the Taylor farm therein mentioned," and agreed "to accept only a money award in his favor for such sum as, under such contract and the testimony given before them, such arbitrators shall determine he should justly receive." We must hold that such submission was not void by reason of the plaintiff's interest in the land.

The contention that the arbitrators had no power to order or determine that the plaintiff should have judgment, for the reason that that question had not been submitted to the arbitrators, is without merit, since such submission not only contained the language just quoted, but the parties therein expressly agreed "that a judgment of the circuit court of Grant county shall be rendered upon the award made pur-

suant to this submission." The legal title to the farm and the personal property on the farm was in the defendant, and the submission very properly required the plaintiff "to accept only a money award in his favor." The judgment is pursuant to the award, and against the defendant personally. There being no fraud or mistake, the parties are conclusively presumed to have known the contents of the agreement for the submission to arbitrators. *Montgomery v. Am. Cent. Ins. Co.* 108 Wis. 146, 156. In a recent opinion of this court, written by my brother DODGE, it is said, in effect, that where the arbitrators have exercised, or attempted to exercise, their judgment upon the questions submitted to them, their award must, in the absence of fraud, misconduct, or mistake, stand as fixing the rights of the parties just as fully and finally as if the amounts fixed by them had originally been agreed upon by the parties and written into the contract; and that the award is none the less binding because the arbitrators have erred in judgment upon any question of fact or law submitted to them for judgment, such errors being among the contingencies which parties assume when they select such tribunals. *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 503, and cases there cited. When questions of law and fact involved in a controversy are submitted to arbitrators by the parties, their award cannot be assailed on the ground of errors honestly committed by them, whether of law or fact, except in the cases prescribed by statute. Secs. 3552, 3553, Stats. 1898; *Fudickar v. Guardian M. L. Ins. Co.* 62 N. Y. 392; *Hoffman v. De Graaf*, 109 N. Y. 638; *Sweet v. Morrison*, 116 N. Y. 19, 33; *Matter of Wilkins*, 48 App. Div. 433. Thus, it is held that the award of arbitrators cannot be interfered with for mere error of judgment as to the law or the facts submitted to them. *Id.* In other words, so long as arbitrators keep within their jurisdiction, the court has no general supervisory power over their awards. *Id.* "Unless restricted by

the submission, arbitrators may disregard strict rules of law and evidence, and decide according to their sense of equity." *Fudickar v. Guardian M. L. Ins. Co., supra.* "The presumption is that arbitrators considered every matter submitted to them, and made their award with respect thereto." *Wood v. Treleven*, 74 Wis. 577. As indicated in the statement, the parties agreed to, and did, "submit their respective claims under said contract" to the arbitrators. That called for a complete accounting between them, and the determination of their respective rights under the contract, except as stipulated in the agreement of submission. We find no ground for disturbing the judgment on the defendant's appeal.

The plaintiff appeals because the court refused to confirm the award as made, but modified the same by deducting from the $1,009.67 award to the plaintiff $131.67, being one third of the value of Kate Flynn's services. She was a sister of the defendant, and lived with him, and constituted a part of his family at the time of the making of the land contract. Under that contract, all proceeds of the two farms "over and above the necessary running expenses, and over and above the maintenance of the" defendant "*and his family*" and the plaintiff, was "to be applied upon and for payment of" the Taylor farm. Since Kate Flynn constituted a part of the defendant's family, and since the respective claims of the parties under that contract were submitted to the arbitrators, it is obvious, under the principles of law stated, that the award of the arbitrators as to that claim was binding upon the parties and was not subject to revision by the court.

But the deduction of one third of the amount which the defendant had received for fees as town clerk, amounting to $100, from the amount so awarded to the plaintiff, stands on a different principle. Such fees were not covered by, nor referred to in, the land contract. The facts in respect to such fees are alleged in the defendant's answer, but were no-

where submitted to the arbitrators. This being so, the court properly modified the award by deducting therefrom the $100 so allowed. The statute expressly authorized the court "to modify or correct such award," since the arbitrators had awarded the same upon a "matter not submitted to them," nor "affecting the merits of the decision upon the matters submitted" to them. Sec. 3553, Stats. 1898; *Doke v. James*, 4 N. Y. 568.

The plaintiff insists that the trial court committed an error in treating the award as embodying the correction made by the arbitrators six days after the date of the original award, whereby there was charged to the plaintiff $82.50, being one third of $247.50, the value of nine head of cattle which the defendant owned in 1894, and which, "by an oversight" on their part, had not been "counted to his credit." It is true, as a general rule, that after arbitrators have made and delivered their award they become *functus officio* and have no power thereafter to rejudge the case and alter the award. *Doke v. James*, *supra*; *Flannery v. Sahagian*, 134 N. Y. 85; *Herbst v. Hagenaers*, 137 N. Y. 290. Counsel concede that, if the defendant had moved to modify the award upon the ground that there had been a miscalculation of figures or an evident mistake, the court would have had power to modify the same accordingly. The statute authorized the court "to modify or correct such award . . . when there is evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in such award." Sec. 3553, Stats. 1898. The motions made by the respective parties gave the court power to correct such miscalculation or mistake in a matter so submitted to the arbitrators, and the order of the court, treating the award as so corrected, must be regarded in part as an order so modifying the award. The correction is dated on the same day the original award was filed. The land contract and the submission to the arbitrators required them to take

into consideration the nine head of cattle owned by the defendant in April, 1894. By a mere oversight, they at first omitted to give credit for the value of such cattle. In making the correction there was no rejudgment nor opening of the case, but merely adding figures which by mistake had been omitted. Under the rulings of this court, the correction of such mistake was permissible. *Ferson v. Drew*, 19 Wis. 225; *Bancroft v. Grover*, 23 Wis. 463

By the Court.— The judgment of the circuit court is affirmed, in so far as it is called in question by the defendant's appeal; and upon the plaintiff's appeal the judgment is modified by reducing the amount of the award and increasing the amount of the judgment which the plaintiff is to recover to $909.67, but in all other respects the judgment is affirmed. No costs are allowed in this court on the plaintiff's appeal, except that the defendant must pay the fees of the clerk of this court.

DECKER, Administrator, Respondent, vs. MCSORLEY, Appellant.

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May 23 — June 20, 1901.

Municipal ordinances: Pleading: Animals running at large: Knowledge of owner: Killing of child: Contributory negligence: Instructions to jury: Proximate cause: Evidence: Expectancy of life and of pecuniary benefit to parents.

1. A municipal ordinance may be pleaded by stating its substance and legal effect, without referring to its title or the date of its passage.
2. An ordinance provided that "no horse . . . shall be permitted to run at large in the city at any time, nor be herded or pastured in or upon any street of said city, nor be permitted to graze or feed in any of said streets, except in such parts of said street as are in front of or adjoining lands owned or occupied by the owner or keeper of the animal grazing or feeding thereon," etc. *Held*, that

the exception was not to the prohibition against running at large, but to the prohibition against grazing or feeding, and that to be within the exception the animal must not only be in front of its master's premises, but must also be attended or be securely tethered and not at large.

3. One purpose of such ordinance was to protect persons from injury, and its violation is ground for a claim of negligence in an action for personal injury inflicted by a horse so running at large.

4. Evidence that the horse inflicting such injury had frequently been at large in the streets was admissible as tending to show that it was at large with the knowledge and assent or permission of the defendant, its owner.

5. Absence of a strong, healthy boy, four and one-half years old, from home, unattended, upon a residence street, in the daytime, is insufficient of itself to warrant a holding that his parents were guilty of negligence as matter of law.

6. In one part of a charge attempting to define "proximate cause" the use of the word "not" rendered the instruction the exact reverse of what it should be, and the element of natural and probable consequence, contained in another part of the charge, was omitted. *Held*, that the whole charge on the subject was confusing and calculated to mislead the jury.

7. In an action for the death of a child four and one-half years old, it was error to admit in evidence a mortality table showing the expectancy of life of a child ten years of age, but not that of a child four and one-half, where the witness admitted that the expectancy of the latter was less than that of the child of ten, but could not state what it was.

8. Evidence that a boy four and one-half years old was strong and healthy at the time he was killed, that his father had no property and had a wife and four children,— with no showing as to the health of the parents, their age, or the earning capacity of the father,— is insufficient to justify a jury in finding that there was any reasonable expectancy of pecuniary benefit to the parents from the continuance of the boy's life beyond minority.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action by the plaintiff, as administrator of the estate of one Blair Decker, deceased, to recover damages for the death of said Blair Decker, such death having resulted from the kick of a horse owned by the defendant.

The evidence showed that the accident happened upon Caledonia street, in the city of La Crosse; that Blair Decker, the deceased, was a boy four and one-half years of age, and was the son of the plaintiff; that on the morning of September 23, 1899, a horse owned by the defendant was grazing on Caledonia street, in the city of La Crosse, unattended and not tethered; that the place where the horse was grazing was in front of a lot owned by the defendant and occupied by a tenant; that the plaintiff and his family lived on the same street, at a short distance from the place where the horse was grazing; and that at some time between 8 and 9 o'clock a. m. upon the date named the deceased came along the street alone and passed close by the horse, and while he was doing so the horse turned and kicked him in the head, inflicting injuries from which he died a few days later. The complaint alleged that there was an ordinance of the city of La Crosse, in force, prohibiting animals from running at large in the public streets, and also that the horse was vicious in his disposition, and known to be so by the defendant, and that she negligently permitted the horse to run at large in the public streets, and that the death of the deceased was the result of such negligence. The complaint further alleged that the deceased was a strong, healthy boy, and that the plaintiff and his wife were entitled to and dependent upon his services. The answer admitted the death of the boy and the relationship of the parties, as well as the due appointment of the plaintiff as administrator, and denied all the other allegations of the complaint.

A special verdict was rendered in the action as follows:

"(1) Was the defendant's horse running at large in the streets of the city of La Crosse at the time of the alleged injury? Yes. (2) In case you answer question No. 1 in the affirmative, then was the defendant negligent in permitting the horse to be at large at the time of the injury to the deceased child? Yes. (3) In case you answer question No. 2 in the affirmative, then was such negligence the proximate

cause of the death of the child? Yes. (4) At the time of the alleged injury, was the horse feeding in the public highway upon lands owned by the defendant? *By the court:* Yes. (5) Were the parents of the deceased child guilty of any want of ordinary care which in any way contributed to the injury? No. (6) Had the defendant's horse any propensity to kick or bite? No. (7) If you answer question 6 in the affirmative, then had the defendant ever had any knowledge or information of any such propensity on the part of the horse to kick or bite? No. (8) Was section 1 of Ordinance 21 of the city of La Crosse in force on the 23d day of September, 1899? *By the court:* Yes. (9) In case you find the plaintiff is entitled to recover under the law, at what sum do you assess his damages? One thousand dollars."

Judgment for the plaintiff was rendered upon the verdict, and the defendant appeals.

For the appellant there was a brief by *Paul W. Mahoney*, *Thomas Morris*, and *Higbee & Bungé*, and oral argument by *E. C. Higbee*. To the point that evidence of other specific instances when defendant permitted her horse to run at large was inadmissible, they cited *Kaufer v. Walsh*, 88 Wis. 69; *Nash v. Hoxie*, 59 Wis. 384; *People v. Gibbs*, 93 N. Y. 470; *Thompson v. Bowie*, 4 Wall. 463.

For the respondent there was a brief by *Bleekman & Bloomingdale*, and oral argument by *F. H. Bloomingdale*. They contended, *inter alia*, that in all cases where it becomes material to inquire as to whether an act is wilful or intentional, or where it is essential to show notice to the party, or knowledge on his part of the existence of certain facts, evidence of collateral facts of a similar nature upon other occasions is always admissible. 1 Jones, Ev. § 146; *Shaw v. Sun Prairie*, 74 Wis. 105; *Alberts v. Vernon*, 96 Mich. 549; *People v. Gibbs*, 93 N. Y. 470. It was negligence *per se* upon the part of the defendant to permit the horse to run at large in the city in violation of the ordinance. *Baldwin v. Ensign*, 49 Conn. 113; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 646. The question of contributory negligence on the part of the child's

parents was one for the jury. Beach, Contributory Negligence (2d ed.), §§ 278, 281; *Cosgrove v. Ogden*, 49 N. Y. 255; *McGarry v. Loomis*, 63 N. Y. 104; *Birkett v. Knickerbocker I. Co.* 110 N. Y. 504; *Keyser v. C. & G. T. R. Co.* 56 Mich. 559; *Johnson v. C. & N. W. R. Co.* 56 Wis. 274.

WINSLOW, J. The plaintiff predicated his claim of negligence on the part of the defendant in this case upon two grounds: first, on the ground that the horse was permitted to be at large in the street in violation of the terms of an ordinance of the city of La Crosse; and, second, on the ground that the horse was a vicious horse, and was permitted to be at large by the defendant with knowledge of its vicious character.

It is claimed by the defendant that the ordinance was not sufficiently pleaded to entitle it to be admitted in evidence. The complaint alleged generally that at the time of the injury one of the ordinances of the city of La Crosse, duly enacted, prohibited the running at large of horses within the limits of said city, and that said ordinance provided, among other things, that the owner or person in charge of such animal who should permit the same to run at large within the limits of the city contrary to the provisions of the ordinance should be punished by fine. This was, we think, entirely sufficient, as against an objection made upon the trial. The ordinance was pleaded by stating its substance and legal effect. A foreign statute may be pleaded by stating its terms, without referring to its title or the day of its passage. *Central T. Co. v. Burton*, 74 Wis. 329. No reason exists why a stricter rule should be applied to the pleading of a city ordinance.

The ordinance was introduced in evidence, and sec. 1 thereof reads as follows:

"No horse, sheep, goat, swine, mule, colt, goose or cattle, nor any poultry, turkeys or chickens shall be permitted to run at large in the city at any time, nor be herded or pas-

tured in or upon any street of said city, nor be permitted to graze or feed in any of said streets, except in such parts of said street as are in front of or adjoining lands owned or occupied by the owner or keeper of the animal grazing or feeding thereon, and if found running at large, each and every one of the animals aforesaid may be impounded under the provisions of this ordinance, in any public pound of the city, and any owner or owners of the animals above specified, or any person in whose charge the same may be, who shall permit the same to run at large within the limits of the city of La Crosse contrary to the provisions of this ordinance, shall on conviction thereof before the justice of the peace of the city at large be punished by a fine not exceeding ten dollars nor less than one dollar."

The plaintiff's claim is that the ordinance was enacted for the purpose, among others, of protecting persons lawfully upon the streets from injury resulting from the viciousness or playfulness of horses or cattle at large, and hence that an infraction of the ordinance is negligence *per se*, which, if it results in injury to a passenger on the street, constitutes actionable negligence. *Smith v. Milwaukee B. & T. Exchange*, 91 Wis. 360. In response to this claim the defendant makes two replies: first, that the horse was feeding in front of the plaintiff's own land, and hence there was no violation of the ordinance; and, second, that the ordinance was not enacted for the purpose of protecting persons from injury, and hence that its violation cannot be ground for a claim of negligence upon which an action for personal injury can be founded.

As to the first of these claims of the defendant, we think it quite plain that it is not well founded. The ordinance is not happily worded, but its purposes are quite plain. Those purposes are to prevent the running at large of animals in the street, to prevent their being herded or pastured in the street, and to prevent their grazing or feeding in the street. There is no exception to the prohibition against their running at large, but there is an exception to the prohibition

against grazing or feeding, which exception consists simply in permitting such grazing or feeding in front of the owner's premises. This exception cannot be reasonably construed as meaning that, when an animal which is running at large happens to crop the grass for a few moments in front of its owner's premises, it ceases to be running at large. An animal which is unattended and untethered in the street is as much at large when in front of its master's premises as in any other part of the street. In order to be within the exception, we think it clear that the animal must not only be in front of its master's premises, but must also be attended or be securely tethered and not at large.

As to the claim that the ordinance was not intended to protect persons from the viciousness or playfulness of animals at liberty upon the highway, we think it is equally untenable. Doubtless there were several objects in view. It was probably not expected that chickens or poultry would inflict bodily injuries on passengers, and, as to this class of animals, the only object was to prevent the well-known nuisance and danger of their committing depredations on private property which result from their being at large. As to larger animals, such as horses and cows, doubtless the same object was in view, but we see no reason to doubt that the obviation of other dangers was also aimed at. That such animals at large in the street are dangerous to passengers is a well-known fact. They are liable to run, to play, to excite other horses, dash along sidewalks, and do numerous things well calculated to cause injury to both persons and property. There are few grown persons who will not turn aside and seek to avoid proximity to a horse at large upon the street, especially if he be gamboling or running. They will do this because they feel that there is personal danger in such proximity, and a danger which is hard to be guarded against, because of the sudden and unaccountable movements which the animal may at any time make,

even if he be not vicious. To say that the common council of La Crosse had no intention of guarding the public against such dangers in enacting the ordinance would, we think, be entirely unreasonable, and would, in effect, accuse them of passing an elaborate law to protect lawns and sidewalks from disfigurement and leave life and limb unprotected. The principle that the owner of a horse which is allowed to run at large upon the highway contrary to law is responsible for the injuries which the horse inflicts upon persons or property, even in the absence of known viciousness of the horse, has been distinctly laid down in a number of states. *Baldwin v. Ensign*, 49 Conn. 113; *Decker v. Gammon*, 44 Me. 322; *Barnes v. Chapin*, 4 Allen, 444.

Having concluded that the ordinance was intended for the protection of passengers in the street against just such injuries as occurred in the present case, and that the evidence here does not show that the horse was within the exception contained in the ordinance at the time the boy was hurt, we proceed to the consideration of various alleged detail errors:

The court allowed a number of witnesses to testify that the horse was frequently at large upon the public streets prior to the accident, and this ruling is claimed to be error. We think the evidence was rightly admitted. The ordinance prohibits and punishes the *permitting* of animals to run at large. The mere accidental escape of an animal, without the owner's knowledge or negligence, would clearly not be a violation of the ordinance. It was competent and in fact necessary, therefore, for the plaintiff to show in some way that the horse was at large with the knowledge and assent or permission of the owner. It was a case where the knowledge or intent of the defendant was in question, or, perhaps more accurately, where it was necessary to show that the act in question was not accidental; and in such cases the rule is quite well settled that similar acts, though collateral

in their nature, may be shown, as tending to throw light on the knowledge or intent of the party. 1 Jones, Ev. §§ 145, 146; *Huganir v. Cotter*, 92 Wis. 1.

The court refused to instruct the jury that "the absence of the child from home, unattended, on a public street, was *prima facie* evidence of negligence on the part of the parents, and there is no evidence in the case which tends to show justification or excuse for their failure to look after him," and this refusal is now claimed as error. The instruction so asked was tantamount to an instruction that contributory negligence was proven as matter of law. It must be remembered that contributory negligence is a defense, and that, unless the facts which show it appear by the evidence introduced by the plaintiff, it must be proven by the defendant. *Randall v. N. W. Tel. Co.* 54 Wis. 140. The only facts appearing here bearing upon the question were that the deceased was a strong boy, four and one-half years of age, and was upon a public street, unattended, at about 9 o'clock in the morning. It is not shown whether the street was largely traveled, but it was evidently a mere residence street, and may not have been traveled to a much greater extent than a country highway. A railroad track, frequently used, crossed the street at a distance of about a block from the plaintiff's house. It is true that in Massachusetts it has been held contributory negligence for a mother to allow a child twenty months of age to escape from her sight and stray into the street and there remain for fifteen minutes without attendance or attention. *Grant v. Fitchburg*, 160 Mass. 16. We are not inclined to approve so strict a rule as this, and, furthermore, in the present case the child is nearly three years older than the child involved in the Massachusetts case cited. It may well be that circumstances might arise where a court would be well justified in deciding the question of contributory negligence as matter of law. If, for instance, a parent knowingly per-

mitted a child of very tender years to go alone and unattended upon the main streets of a great city, where travel was great and constant, such a case might perhaps be presented. But the present is certainly not such a case. The street in question here may have been a rarely used street. If it was otherwise, the burden lay on the defendant to prove the fact. The child may have only momentarily escaped from its mother's care, under circumstances which would exonerate her from all lack of due attention. If not, the burden was also on the defendant to prove the fact. Ordinary care on the part of the parent is all that is required. We cannot say that the evidence here shows lack of ordinary care. It is a well-known fact that children of four and one-half years are frequently on the public street unattended. Whenever an accident happens to such a child through the negligence of others, must it be said that the parent is negligent, as matter of law? Such a rule would amount, practically, to a notice to all, whether rich or poor, who live in a crowded city and are blessed with children, that they must employ a nursemaid to be continually at the side of their children, or keep them locked up at home. The question was one for the jury, upon the evidence.

The trial judge charged the jury upon the subject of proximate cause as follows:

"This term, 'proximate cause,' has a certain, definite meaning in the law. It has been referred to by attorneys during the argument of the case, and proximate cause of damage to a person cannot be referred to a failure or neglect of some other person to perform some duty or act which such other party owes or was under obligations to perform, unless it appears that such damage was the natural and probable consequences of such failure or neglect, and that such loss or damage ought to have been foreseen in the light of the attending circumstances. That is, from all the circumstances in this case, before you are justified in finding that negligence of the defendant was not the proximate cause of injury to the child, you should be satisfied, from all the cir-

cumstances in the case, she ought reasonably to have foreseen that an injury to a person upon the street might be liable to happen from the horse being at large. It is not necessary, in order to warrant a finding to this effect,— that it was the proximate cause,— that the defendant should have foreseen that an injury might happen to this particular child; but if, from all the circumstances in the case, in the exercise of reasonable and ordinary care the defendant ought to have foreseen or anticipated that injury to a person on the street might be liable to happen from the horse running at large, then this element of proximate cause would be found in this case."

There was inaccuracy, if not prejudicial error, in the latter part of this instruction. In the first definition given, the jury were told that it must appear that the damage was the natural and probable consequences of the negligence, but in the subsequent clauses not only is the word "not" inserted where it manifestly renders the instruction the exact reverse of what it should be, but the element of natural and probable result is entirely omitted. Certainly the whole charge on the subject was confusing and well calculated to lead the jury astray.

Upon the subject of damages there were errors committed which certainly require reversal of the judgment. The court permitted the introduction of a mortality table showing the expectancy of life of a child ten years of age. The witness admitted that the expectancy of life of a child of four years was less than that of a child of ten, but he could not state what it was, nor did the table give it. This was clearly error. Upon the subject of damages generally, the evidence was very meager. Practically all that the testimony shows is that the child was strong and healthy, and that the father had no property and had a wife and four children. Under this condition of the evidence, we cannot say that there was any evidence which would justify the jury in finding that there was any reasonable expectancy of pecuniary benefit to the parents from the continuance of the life of the child be-

yond its minority. It is true that there is very little of such evidence which can be introduced in any case, especially where the child is of such tender years, but this fact simply emphasizes the need of introducing all that can be obtained. In the present case the health of the parents might have been shown, their age, and the business and earning capacity of the plaintiff. All these things would have thrown some light on the subject. *Potter v. C. & N. W. R. Co.* 21 Wis. 372. Nevertheless the court submitted to the jury the question as to the pecuniary loss suffered by the plaintiff, resulting from the loss of the boy's services and help after he attained his majority, and we are unable to say what part of the damages allowed by the jury was allowed for services after majority. Nor can we say with any certainty what should have been allowed by the jury for the boy's services while a minor. We think, therefore, that it would not be possible for us to allow the plaintiff to remit any certain sum from the verdict, but that the interests of justice would be best subserved by a new trial.

By the Court.— Judgment reversed, and action remanded for a new trial.

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116 [3]308
116 [2]561

SWARTHOUT, Respondent, vs. SWARTHOUT and others, by guardian *ad litem*, Appellants.

May 23 — June 20, 1901.

Appeal: Judgment: Wills: Construction: Precatory trust: "Provision" for after-born children.

1. The decision of the circuit court upon an appeal from the county court, though in form an order, is a judgment and appealable as such.
2. A will gave all the testator's property to his wife, but stated that it was his wish that such property "or so much thereof as my said wife may be possessed of at her decease shall go to or be by her

given to our child or children, if any there be then living." At his death the widow was of an age rendering a second marriage among the probabilities. He left three minor children, two being girls and the youngest a boy, two of whom were born after the execution of the will. The estate was so large that the testator must have expected that the income thereof, under proper management, would exceed the amount necessary to support his widow in comfort during her life and provide for the support and education of the children. *Held*, that the will should be read as intending to give the property to the widow for life, with remainder over to such of testator's children as should survive her, and making her a trustee of the property so far as required to effect that purpose.

3. If such will were construed to give the widow the whole estate absolutely, it could not be sustained as against the two children born after its execution. [Whether, when construed as giving a contingent remainder to such children, it makes a "provision" for them, within the meaning of sec. 2286, Stats. 1898, not determined.]

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Reversed.*

Frank Willis Swarthout, deceased, disposed of his property by will as follows:

"I give, devise and bequeath unto my wife, *Cora F. Swarthout*, all and singular my property and estate real and personal.

"It is my wish that such property and estate above devised, or so much thereof as my said wife may be possessed of at her decease, shall go to or be by her given to our child or children, if any there be then living.

"I hereby nominate my said wife as executrix of this will."

The will was duly admitted to probate in the county court of Monroe county. Thereafter, upon the affidavit of *Cora F. Swarthout* to the effect that the debts of the estate would not exceed $200 and the expense of administering the estate $100, a motion was made in her behalf for permission to take possession of and handle the estate as sole beneficiary under the will, pursuant to sec. 3795, Stats. 1898, upon her giving a bond in the sum of $600 for the payment of the debts. The application was opposed by the three minor children of deceased and plaintiff, who were represented by

C. M. Masters, their duly appointed guardian *ad litem*. Representations were made in behalf of such minors that the personal property of the estate was of the value of $60,000 or more. No proof was presented by or on behalf of the executrix as to the value of the estate or any part thereof, or of what the estate was composed. The motion was denied and the executrix was ordered to file with the court, by a day named, a schedule of the personal property of which the testator died possessed.

Such proceedings were thereafter duly had that the matter of the right of the executrix to administer the estate as sole beneficiary was presented to the circuit court for Monroe county, an appeal being taken from the order before mentioned. The result of the hearing in the circuit court was that an order or judgment was entered, reversing the order of the county court and determining that the executrix should recognize as sole beneficiary under the will, and that she should be permitted to administer the estate as such upon giving a bond in the sum of $5,000. From that order or judgment this appeal was taken.

C. M. Masters, guardian *ad litem*, for the appellants, argued, among other things, that precatory words in a will, equally with direct fiduciary expressions, will create a trust. Beach, Wills, §§ 20, 215–217; *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 59 Wis. 172; Jarman, Wills (5th ed.), *385; 2 Woerner, Administration (2d ed.), § 415, p. 954; *Bacon v. Ransom*, 139 Mass. 117–119. In a devise of the entire estate to the wife, there is nothing incompatible with only a life estate being created, when the devise is followed by words indicating such intention. *Terry v. Wiggins*, 47 N. Y. 512; *Smith v. Bell*, 6 Pet. 68, 75, 76; *Tabor v. Tabor*, 85 Wis. 313; *Allen v. Boomer*, 82 Wis. 364. If the words of the will could be construed to give to the devisee the right to dispose of any portion of the testator's estate, the life estate would not necessarily be enlarged to a fee. *Jones v. Jones*,

66 Wis. 310, and cases there cited; *Terry v. Wiggins*, 47 N. Y. 512; *Smith v. Bell*, 6 Pet. 68; *Stuart v. Walker*, 72 Me. 146, 39 Am. Rep. 311; *Larsen v. Johnson*, 78 Wis. 300; *Derse v. Derse*, 103 Wis. 113. To adhere to the construction sought by the respondent would cut off the only provision made for the children of the testator, and would be contrary to the settled rule that "an heir can only be disinherited by express devise or necessary implication so strong that a contrary intention cannot be supposed." 3 Jarman, Wills (5th Am. ed. by Randolph & T.), 704, rule 5; *Gelston v. Shields*, 78 N. Y. 275.

S. W. Button, for the respondent, contended, *inter alia*, that all children born or unborn are mentioned in this will and were in the mind of the testator, hence were not left out by accident or mistake. It shows a clear purpose to make no provision for them. Secs. 2286, 2287, Stats. 1898; *In re Donges's Estate*, 103 Wis. 511; *Verrinder v. Winter*, 98 Wis. 290; *Bresee v. Stiles*, 22 Wis. 120; *Moon v. Estate of Evans*, 69 Wis. 667; *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130. If it is held that only a power is given to the widow to dispose of the property, her title to the whole would be absolute because of such power. Secs. 2107, 2108, 2110, 2112, 2278, Stats. 1898; *Larsen v. Johnson*, 78 Wis. 308; *Bamforth v. Bamforth*, 123 Mass. 280; *Campbell v. Beaumont*, 91 N. Y. 464; *Crane v. Wright*, 114 N. Y. 310; *Gifford v. Choate*, 100 Mass. 343; *Johnson v. Battelle*, 125 Mass. 453; *Lawrence v. Cooke*, 104 N. Y. 632; *Mitchell v. Morse*, 77 Me. 423; *Hinkle's Appeal*, 116 Pa. St. 490; *Deegan v. Ward*, 144 N. Y. 573, 578; *Foose v. Whitmore*, 82 N. Y. 405; *Barrett v. Marsh*, 126 Mass. 213; *Howard v. Carusi*, 109 U. S. 725; *Jones v. Bacon*, 68 Me. 34; *Stewart v. Walker*, 72 Me. 145. Even where a will expressly gives only a life estate to the widow, but with power to dispose of so much of the estate as is necessary for her support, with remainder over to children, it is held no trust is created. *Bamforth*

v. Bamforth, 123 Mass. 280; *Stevens v. Winship*, 1 Pick. 317; *Bishop v. Remple*, 11 Ohio St. 277.

MARSHALL, J. It is suggested by respondent's counsel that the order, so called, of the circuit court, is not appealable because it is merely interlocutory in character, not terminating an action and preventing a judgment from which an appeal could be taken. The determination of the matter in the circuit court was interlocutory as regards the proceedings in the county court, but a final determination of such matter in the former court. It was to all intents and purposes a final judgment and appealable as such, though it was, in form, an order. The statute (sec. 4037, Stats. 1898), regulating proceedings in the circuit court in such matters, provides:

"The circuit court may reverse or affirm in whole or in part the act appealed from and may render such judgment as may be proper or make such order therein as the county court ought to have made, and may remit the case to the county court for further proceedings in pursuance of the opinion of the circuit court, or may make any order, or take any action therein, or enforce its own judgment, as such circuit court may deem best."

The decision appealed from was rendered pursuant to that statute. It was the judgment of the circuit court on the matter presented for adjudication and must be tested, as to its appealability, by the statute on the subject of appeals from judgments. The final determination of appeals in the circuit court in such cases is characterized, in the words of the section referred to, as "a judgment," and that must necessarily be its character. Whether the determination of a court is an order or a judgment within the meaning of the appeal statute, cannot always be solved by mere form. The nature of the adjudication and of the proceeding must be considered. A proceeding upon appeal, as regards the appellate court, is an action, or a proceeding in the nature of

an action, and the decision is a final determination of the rights of the parties in respect thereto. Sec. 2882, Stats. 1898. Every appeal to the circuit court, to all intents and purposes, is an action in such court. It is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right or the redress or prevention of a wrong." Sec. 2595, Stats. 1898. In this case respondent, by her appeal from the decision of the county court, instituted a proceeding in the circuit court to redress the wrong, as alleged, committed by the former court in refusing to recognize her as sole beneficiary under her husband's will and to allow her to proceed to administer the estate according to the statutes in such cases. The determination of the appeal was a final determination of the rights of the parties in respect to the matter at issue as regards the power of the circuit court, hence a judgment of that court. Unlike the situation in *Jones v. Roberts*, 84 Wis. 465, cited by respondent's counsel, here the persons interested in the construction of the will adversely to respondent had notice of the proceeding. Such proceeding necessarily turned on the meaning of the instrument, and the question involved was litigated and decided. It follows that the contention that the order, so called, of the circuit court, was not appealable, cannot be sustained; that such order is in effect a judgment; and that appellants, as parties thereto, aggrieved thereby, had a right to appeal therefrom.

It is elementary law that precatory words in a will, following a bequest or devise in general terms, expressing a desire or wish as to the ultimate use or disposition of property devised or bequeathed, or some portion thereof, by the person taking the title in the first instance, may be construed as creating a trust in such first taker for the benefit of the other person or persons named, if that, under all the circumstances, appears clearly to have been the intent of the

testator, and such intention can be read from the language used by him by the aid of those liberal rules which obtain for the purpose of giving effect to testamentary words. The circumstances of the use of the words which call for such construction are so various that it is well-nigh impossible to refer to adjudged cases as governing authorities in any particular case presented to the court for decision. Courts take more liberties in the construction of wills than of any other written instruments, judging in each case, as to the intention of the testator, by established judicial rules, without any governing regard for the result in any other case. That necessarily must be so from the very nature of the subject involved. Justice WILMOT, in *Keiley v. Fowler*, Wilm. Op. 319, well described the manner in which a will must be viewed in determining its meaning, in the following language:

"Every case stands upon the evidence of the testator's intention, arising out of each will. In questions of intention, cases, unless they coincide in words and every other circumstance, never assist, but perplex the exposition. A will is the picture of a man's mind; and one may as well look at the picture of one man to know the person of another, as look at the will of one mind to know the mind of another."

It will serve no valuable purpose to go at length into a discussion of the multitude of cases that exist, where words expressing a wish, hope, desire, or request have been construed as equivalent to words of command and to create a trust with the same definiteness as if the intention of the testator were made manifest by language in its literal sense. The subject was very fully discussed by Mr. Justice TAYLOR, speaking for the court, in *Knox v. Knox*, 59 Wis. 172, and several general rules were there deduced from the teachings of courts and eminent text-writers, which need no addition, and by the aid of which the intention of the testator, in cases of this kind, can be determined with the highest degree of certainty practicable by judicial construction. Such

rules are as follows: (1) It is not necessary that technical language should be used to create a trust. It is enough that the intention is apparent. (2) Precatory words used in a will,— that is, words of recommendation, entreaty, request, wish, or expectation,— addressed to a devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used. (3) In order to determine whether precatory words in a will create a binding trust, the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion. (4) In determining that precatory words in a will create a trust, the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and the *quantum* of the estate to be given to such person or object is also clearly defined.

By applying the foregoing rules to the will in question, the intent of the testator is not difficult to discover with reasonable certainty. He left a widow of an age which rendered a second marriage on her part among the probabilities, and three minor children, the two older ones being girls and the youngest of the three being a boy. The last two of the children were born after the will was executed. He left an estate so large that he must have expected that the income thereof, under proper management, would exceed the amount necessary to support his widow in comfort during her natural life and provide for the support and education of his children. One would expect under such circumstances that a man would not leave it within the power of his widow to handle his estate as her absolute property, not making any certain provision whatever for his infant children. The persons to whom the precatory words apply

are certain, and likewise is the *quantum* of the estate to be given to them, except in so far as it may be affected by the amount of such estate which the widow may legitimately consume during her life. Less persuasive considerations than those mentioned, in *Knox v. Knox*, 59 Wis. 172, led this court to conclude that the precatory words there considered were intended to be words of direction and command. The words in question were addressed by a husband to a wife. That is an important consideration. It is reasonable and natural that a husband should declare his determination as to what shall be done with his estate in the "language of civility," with the conviction that nothing more need be said, where all the circumstances are in harmony therewith, to secure an absolute disposition of his property in accordance with such determination. Here the persons to whom the precatory words refer, in view of their age and the amount of the testator's property and the age of the mother, had claims upon his bounty quite as strong, and which he would be quite as likely to recognize, as hers. The fact that two children were born after the making of the will is significant, particularly since the youngest was a boy. In that situation, how can the court say that the precatory words were not intended to govern the conduct of the wife but were merely suggestive as to what, in the judgment of the testator, would be a reasonable exercise of the widow's discretion in the disposition of her own property? In our judgment such a conclusion would be highly unreasonable. The opposite intent seems very clear and in harmony with every part of the will.

While, as said in *Knox v. Knox*, 59 Wis. 172, apt words were used to convey a full title to the estate to the wife, that circumstance is consistent with the view that the conveyance was in trust for the object subsequently indicated. If that object had been expressed by using words in their literal sense, the words of conveyance would have been the

same. There is nothing in the will to indicate that an absolute estate was intended to be created in the wife, other than the use of the mere technical words of conveyance, which words would have been used in any event. The language which followed the words of conveyance, under all the circumstances, repels the idea that they were intended to place the estate of the testator under the absolute control of the wife to be enjoyed and disposed of as her individual property. There are no words of inheritance or words declarative of any intent that the widow shall have the right to enjoy the estate as hers absolutely, as in many cases where precatory language has been held to be merely advisory and to leave the execution of the wish of the testator to the discretion of the persons to whom it was addressed. There were no words guarding against the precatory expression being construed as a direction or command, as in *Tabor v. Tabor*, 85 Wis. 313, where the will declared that the wish expressed, as to what should be done with the estate, was not to be construed as limiting the ownership and power of disposition as owner, indicated in the words of absolute gift. From any standpoint we can reasonably view the language under consideration, as it seems, it appears to satisfy every judicial rule recognized as a safe guide in considering such testamentary expressions as creating a trust in the person to whom they are addressed, and a binding obligation upon the trustee to administer the subject thereof accordingly.

It follows that we must hold that the will in question should be read as intending to give the property of the testator to the respondent for life, with remainder over to such of his children as may be living at the termination of the life estate, and making respondent a trustee of the property so far as required to effect that purpose. It is not necessary to indicate here the precise scope of respondent's power over the property as the first beneficiary thereof or to decide finally that she is entitled to a life estate in the

entire property. Having determined the nature of her interest in the estate to the ultimate extent thereof, which in any view she is entitled to, and that the decision of the trial court that she is the sole legatee and devisee under the will is erroneous, the other questions involved may be left for now to the court that has to do with supervising the administration of the trust, which court will require the proper bond to be given by respondent to protect the interests of her children.

In the foregoing, as will be seen, we have only intended to construe the language of the will, showing that the testator did not intend that respondent should possess all his property as hers absolutely. Whether notwithstanding the conclusion reached she has a life estate in the property as against the two children born after the making of the will, depends upon whether a provision was made for them thereby. Sec. 2286, Stats. 1898. The construction we have given to the will is absolutely essential to sustain it at all as against the two younger children. If notwithstanding such construction the contingent remainder provided for such children be not considered a provision within the meaning of the section referred to, then they are entitled to share in their father's estate the same as if he had died intestate. The fact that there was only one child when the will was made and that the contingent remainder was left to the testator's child or children living at the death of his wife, indicates that he had in mind the probability of after-born children and intended to make some provision for them. *In re Donges's Estate*, 103 Wis. 497. It will be readily seen that the circumstance of there being children born after the date of the will stamps the judgment appealed from as unquestionably erroneous.

Since no further proceedings in this case need be had in the circuit court the order or judgment appealed from will be reversed and the record remanded direct to the county

court, pursuant to sec. 4037, Stats. 1898, with directions to such court to proceed in the settlement and administration of the estate in accordance with this opinion.

By the Court.— The order or judgment appealed from is reversed and the record directed to be transmitted to the county court of Monroe county, which court will upon receipt of such record proceed in the settlement of the estate and administration thereof in accordance with this opinion. The taxable costs in this court on both sides will be paid out of the estate.

WALKER, Appellant, vs. VILLAGE OF ONTARIO, Respondent.

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May 23 — June 20, 1901.

Highways and bridges: Use by traction engines: Injury from breaking of bridge: Contributory negligence.

1. The requirement of ch. 197, Laws of 1899, in respect to the spanning of a bridge, before crossing with a steam engine, "with hardwood planks at least two inches thick and twelve inches wide, so that the engine shall rest thereon in crossing," is sufficiently complied with if the tracks upon which the wheels of the engine run are of the required thickness and width, though made up of narrower planks laid side by side.
2. Failure to comply with such requirement of the statute is not a defense to an action for injuries caused by the breaking down of a bridge, unless there was some direct causal relation between such failure and the accident.
3. Ch. 197, Laws of 1899, impliedly justifies the use of highways and bridges by traction engines, without liability on the part of owners, if they comply with its requirements; and *it would seem* that the proper authorities are under obligation to keep up their highways and bridges to a standard of usefulness and safety sufficient for such use.
4. Where the defective and rotten condition of the stringers and braces of a bridge was not so obvious as to be discoverable by ordinary observation, there was no conclusive inference of contributory negligence on the part of a person who was injured by the break-

ing of the bridge while he was attempting to cross it with a traction engine weighing 9,500 pounds, although he had passed over the bridge daily, knew it was twelve or thirteen years old, and did not test the structure by boring into the timbers.

APPEAL from a judgment of the circuit court for Vernon county: E. W. HELMS, Judge. *Reversed.*

Action to recover damages for personal injuries. Plaintiff was steersman on a traction engine weighing 9,500 pounds. In attempting to cross a bridge in the defendant village, it broke down, and plaintiff was precipitated into the stream and received serious injuries. The bridge had been built some twelve or thirteen years. Its timbers were badly rotted, and the braces decayed considerably. Plaintiff was familiar with the bridge, passing over it daily, but had never noticed its defective condition. He had known the bridge twelve or thirteen years, and the only repairs he knew had been done to it were that it had been replanked. It had a span of twenty feet, and broke nearly in the middle. Before crossing, the bridge was spanned by elm planks two inches thick, from twelve to fourteen feet in length, and from eight to ten inches wide. Testimony was offered and received showing the manner in which the planks were laid, the care used in crossing, the rotten and defective condition of the timbers and braces, and that the average life of a wooden bridge was about eight years. At the close of plaintiff's testimony a motion was made for a nonsuit, on the ground that the evidence affirmatively showed a failure to comply with subd. 5, sec. 1, ch. 197, Laws of 1899, and that plaintiff was guilty of contributory negligence. The motion was granted, the court stating, among other things, that "I don't think the court can take judicial notice of the fact that traction engines are in common use over the highways in this vicinity." From a judgment for defendant the plaintiff brings this appeal.

C. M. Masters, for the appellant, argued, among other

things, that municipalities may be responsible for injuries even though the plaintiff was using the highway in an *uncommon* manner. Unless such "uncommon use" is one that might not have been anticipated by the municipal authorities by the exercise of reasonable prudence and care, considering the kind, nature, and extent of public travel in that vicinity, and increases the danger of an accident, the highway must be maintained in a reasonably safe condition for such use. *Anderson v. St. Cloud*, 79 Minn. 88; *Gregory v. Adams*, 14 Gray, 242; *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51; *Vermillion Co. Comm'rs v. Chipps*, 131 Ind. 56; *Shelby Co. Comm'rs v. Castetter*, 7 Ind. App. 309. The question of contributory negligence, or rather the question whether the plaintiff was subjecting the bridge to an unusual and extraordinary load, is a matter of defense to be alleged, and the evidence upon which the same is predicated submitted to the jury for decision. There can be no presumption that the use of traction engines upon the public highways is an extraordinary use thereof. What is a probable, ordinary, and usual use is as much a matter of fact for the jury as is the question as to whether or not the bridge was in a reasonably safe condition, or whether the defendant could by the exercise of reasonable diligence have discovered its defective condition. *Yordy v. Marshall*, 80 Iowa, 405, 86 Iowa, 340; *Wabash v. Carver*, 13 L. R. A. 851; *Clark Co. Comm'rs v. Brod*, 3 Ind. App. 585; *Gregory v. Adams*, 14 Gray, 242; *Hardin Co. Comm'rs v. Coffman*, 48 L. R. A. 455; *Moore v. Hazelton*, 118 Mich. 425; *Allen Co. Comm'rs v. Creviston*, 133 Ind. 39; *La Porte Co. Comm'rs v. Ellsworth*, 9 Ind. App. 566; *Coulter v. Pine*, 164 Pa. St. 543; *Clapp v. Ellington*, 51 Hun, 58; *Reinhart v. Martin Co. Comm'rs*, 9 Ind. App. 572; *Clulow v. McClelland*, 151 Pa. St. 583, 17 L. R. A. 650.

For the respondent there was a brief by *Graves & Mahoney*, and oral argument by *C. W. Graves*. They contended,

inter alia, that the village officers were only required to construct a bridge strong enough for the usual and ordinary travel thereover at the time of its construction; they are not compelled to anticipate extraordinary loads. *McCormick v. Washington*, 112 Pa. St. 185; *Fulton I. & E. Works v. Kimball*, 52 Mich. 146; *Hardin Co. Comm'rs v. Coffman*, 48 L. R. A. 455; *Clulow v. McClelland*, 151 Pa. St. 583; *Allen Co. Comm'rs v. Creviston*, 133 Ind. 39; *Clapp v. Ellington*, 51 Hun, 58; *Megargee v. Philadelphia*, 153 Pa. St. 340; *Medina v. Perkins*, 48 Mich. 67; *Chicago v. Kohlhof*, 64 Ill. App. 349; *Stebbins v. Keene*, 60 Mich. 217; *Spencer v. Sardinia*, 42 App. Div. 472; *Bonebrake v. Huntington Co. Comm'rs*, 141 Ind. 62; *Dexter v. Canton T. B. Co.* 79 Me. 563; *Richardson v. Royalton & W. T. P. Co.* 5 Vt. 580; *Woodbury v. Owosso*, 64 Mich. 239; *O'Neil v. Deerfield*, 86 Mich. 610; 4 Am. & Eng. Ency. of Law (2d ed.), 935; Elliott, Roads & S. (2d ed.), § 40; 8 Cent. Dig. col. 1145. Noncompliance with ch. 197, Laws of 1899, bars a recovery. Sec. 154, ch. 568, Laws of N. Y. 1890; *Bush v. D., L. & W. R. Co.* 166 N. Y. 210; No. 173, Laws of Pa. 1885; *Comm. v. Allen*, 148 Pa. St. 358; sec. 3, ch. 50, R. S. Me.; *Dexter v. Canton T. B. Co.* 79 Me. 563; sec. 5, ch. 68, Laws of Iowa, 1892; *State v. Orr*, 89 Iowa, 613; *Welch v. Geneva*, 110 Wis. 388.

BARDEEN, J. One of the grounds urged to justify the nonsuit is that plaintiff failed to comply with the requirements of ch. 197, Laws of 1899. That chapter provides, among other things, that the owner of any steam engine who propels it or causes it to be moved along or upon any culvert or bridge shall be liable for all damages (subd. 5, sec. 1) "when the person in charge of any steam engine shall neglect to span any bridge or culvert, before crossing the same, with hardwood planks at least two inches thick and twelve inches wide, so that the engine shall rest thereon in crossing such

bridge or culvert." Plaintiff's testimony as to the manner in which the bridge was planked is as follows:

"Mr. Ritske and I put the plank on the bridge. The plank used were some planks lying there. They were rock-elm plank, I think. They were good, sound plank. Were reasonably straight. The plank were twelve feet long; perhaps one or two fourteen feet. I think one or two of the plank were eight inches wide, and the balance ten inches wide, and one or two twelve inches wide. Am not positive that there were any twelve inches wide. The plank run across the bridge from cap to cap. Then laid down another plank beside them, so as to break joints. Planked both sides alike. . . . The plank were laid side by side, end to end, and another row, breaking the joints, at the side. The joints were broken by laying the plank side by side. The wheels were kept on the plank."

The argument is that, because the planks used were not twelve inches in width, the statute has not been complied with, and hence there can be no recovery. If we understand the testimony quoted, the track upon which the wheels of the engine ran was more than twelve inches in width, but was made up of two planks instead of one. If this is so, the spirit of the statute has been complied with. The plain purpose of the law was to protect the covering of the bridge from injury by the projections or calks on the wheels of the engine. This could be done by two planks placed side by side, as well as by a single plank, if they were together of the required width.

Another important consideration in this connection must be mentioned. To make the failure to comply with the requirements of the statute a defense, it must be shown that there was some direct causal relation between such failure and the accident which followed. This was discussed in *Sutton v. Wauwatosa*, 29 Wis. 21, and emphasized in the late case of *Welch v. Geneva*, 110 Wis. 388. We do not think the trial court was justified, as a matter of law, in saying that such connection or relation existed in this case. The

testimony regarding the defective character of the bridge was quite strong, and, when considered in connection with the other circumstances, there was room for a fair inference that there was no causal relation between the failure to properly plank the bridge and the accident which happened.

It is further argued that the plaintiff was guilty of contributory negligence as a matter of law. The bridge had been built twelve or thirteen years. The stringers and braces were defective and rotten. It does not appear just how close an examination of the bridge would have been required to have discovered these defects, except that one witness said that the usual method of testing such structures was to take a small bit and bore into the timbers. The plaintiff knew of the age of the bridge, and had passed over it daily. So far as he knew, the only repairs that had been made upon it were that it had been replanked some years previous. If the defects mentioned were so obvious that in the exercise of ordinary care the plaintiff could have discovered them, then of course he was guilty of negligence in attempting to cross. But that fact does not clearly appear. Ordinary care did not require him to make the test spoken of by the witness. He was only bound to make use of his senses, and make such observations as common prudence would seem to dictate, in view of his knowledge and all the surrounding circumstances. We do not think the inference of negligence was so conclusive as to justify taking the question from the jury.

A remark of the court, in deciding the motion for nonsuit, to the effect that the court could not take judicial notice that traction engines were in common use over the highways in that vicinity, is supposed to have some significance. If the court was attempting to justify the nonsuit on the ground that a traction engine, weighing 9,500 pounds, was an unusual and uncommon vehicle on the highways, he would seem to be running in the face of the statute. Ch.

197, Laws of 1899, impliedly, at least, justifies the use of highways by such means, without liability on the part of owners, if they comply with its requirements. The fact that the legislature has seen fit to enact regulations concerning the use of engines on highways generally would seem to imply an obligation on the part of the authorities to keep up their highways and bridges to a standard of usefulness and safety sufficient to meet those requirements. Under the proof, however, the court was not required to assume judicial notice of the fact mentioned. One witness, at least, testified to the use of such engines in that vicinity for a number of years, and that was sufficient to carry the case to the jury, if it was deemed of controlling importance. Upon the whole evidence, we think the case should have been submitted to the jury.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

SPUHR, Appellant, vs. KOLB and others, Respondents.

May 23 — June 20, 1901.

Appeal: Findings of fact: Evidence: Judgment.

1. Upon evidence fairly justifying either of two inferences, the decision of the trial court must control.
2. In an equitable action, upon a motion to dismiss at the close of plaintiff's testimony, the proper practice is to make findings and render judgment on the merits.
3. Plaintiff offered in evidence, to be used only as admissions, a deposition of one of the defendants previously taken at plaintiff's instance. Objection being made because the witness was present, the court ruled, in effect, that if the deposition was introduced it would constitute said defendant plaintiff's witness, subject to the ordinary rules against impeachment. Plaintiff did not thereafter attempt to introduce the whole deposition, but was allowed to introduce such specific portions of it as he did offer. *Held*, that there was no error in the ruling.

Spuhr vs. Kolb and others.

APPEAL from a judgment of the circuit court for La Crosse county: CHAS. M. WEBB, Judge. *Affirmed.*

A suit in equity by plaintiff, a judgment creditor of defendant *John M. Kolb*, to set aside conveyances from *John M. Kolb* to his brother-in-law, *John Hornung*, and from the latter to the former's wife, *Carolina Kolb*. At the close of the plaintiff's evidence, which consisted principally in the examination of the defendants, upon a motion for judgment in plaintiff's favor the court made findings to the effect that the conveyance from *John Kolb* to *Hornung* was in consideration of the cancellation and settlement of a *bona fide* indebtedness of $1,200, which was a full and adequate price for the premises sold; that the sale from *Hornung* to *Carolina Kolb* was upon her promise to pay $1,200; that the conveyances "were made in good faith, and for an adequate consideration, and were not made with intent to hinder, delay, or defraud the plaintiff, or any other creditor or creditors of said *John Kolb*." Whereupon judgment dismissing the complaint was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *G. W. Bunge*.

For the respondents there was a brief by *Bleekman & Bloomingdale*, and oral argument by *F. H. Bloomingdale*.

DODGE, J. A careful examination of the evidence shows that, if the witnesses are believed, their testimony overwhelmingly sustains the findings of the court. There are suspicious circumstances and contradictions in the evidence, which might justify a trial court in discrediting those witnesses, but the situation so arising is one upon which the trial court has peculiar advantages for reaching a correct conclusion. The manner and appearance of the witnesses in the explanation of such discrepancies is of very great value. The case, therefore, especially invites the application of the rule that, upon evidence fairly justifying either

of two inferences, the decision of the trial court must control. The decision eliminates all the elements of fraud and of purpose to defraud creditors, and justifies the judgment entered.

Complaint is made that upon a motion to dismiss at the close of plaintiff's evidence there should have been entered a judgment in the nature of a nonsuit, instead of one apparently upon the merits. There is no force to this objection. In a suit in equity the proper practice upon a motion to dismiss at the close of the plaintiff's evidence is to make findings and render judgment on the merits; not, as in a suit at law, to enter judgment of compulsory nonsuit. Bryant, Code Pr. § 885; *Dietz v. Neenah*, 91 Wis. 422, 425; *Yahr v. Joint School Dist.* 99 Wis. 281.

An error is assigned upon the exclusion of evidence, which, however, from an examination of the record, does not seem to be well founded. The plaintiff had taken the deposition of defendant *Hornung* at a time when he was in default, as a witness for the plaintiff, and, although he was present and sworn at the trial, made a qualified offer of that deposition, to be used only as admissions. On objection being made because the witness was present, the court announced that plaintiff could examine the witness as to any statements made at another time, and offer statements in depositions, but could not be permitted to regularly impeach his own witness. As we understand this ruling, it was to the effect that, if the deposition was offered in evidence, it would constitute *Mr. Hornung* the plaintiff's witness, subject to the ordinary rules against impeachments. Plaintiff did not follow this ruling by any further attempt to introduce the whole deposition, but was allowed to introduce such specific portions of it as he did offer. From this record we do not understand that the deposition was excluded, but plaintiff merely warned of the effect of introducing it. Nor does it

appear that the court refused to receive any portions which plaintiff desired to introduce. We discover no error in the ruling.

By the Court.— Judgment affirmed.

TERRY, Appellant, vs. REYNOLDS, Respondent.

May 23 — June 20, 1901.

Real-estate agents: Commissions: Evidence.

1. Defendant agreed to pay plaintiff, a broker, a commission "on sale of my farm, or any part of it, at a price accepted by me. This commission only to be paid in case of sale to a party to whom said [plaintiff] has offered the property." Plaintiff was the first real-estate agent who offered the property to one H., although H. had previously been informed by his son-in-law that the property was for sale. H. afterwards bought a part of the farm through another agency. *Held*, that plaintiff was entitled to the commission.
2. In an action to recover such commission, evidence as to plaintiff's efforts to sell the land to other persons, and as to an offer secured by him of a greater amount than that paid by H., which offer was rejected by defendant, was properly excluded.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *J. W. Bass*, and for the respondent on that of *Rollin B. Mallory*.

CASSODAY, C. J. This action is to recover $532.50, as commissions under a written agreement between the plaintiff and the defendant made in September, 1897, and which reads as follows:

"For $1.00 and other valuable consideration, the receipt of which is hereby acknowledged, I agree to give *F. T. Terry* a commission of three (3) per cent. on sale of my farm,

or any part of it, at a price accepted by me (117.32 acres). This commission only to be paid in case of sale to party to whom said *Terry* has offered the property.

"M. M. J. REYNOLDS."

The complaint alleges, in effect, that in pursuance of that agreement the plaintiff, immediately after making the contract, at the defendant's request, entered upon such service to assist the defendant in selling her property at a price acceptable to her; that he offered the farm, or portions thereof, for sale to divers persons, including Theodore L. Hansen, and in the latter part of 1897, or early in the year 1898, urged him to buy the farm, or a portion thereof, and that July 8, 1898, the defendant did sell and convey a portion of the farm so offered to him for $17,750, which was the amount Hansen paid therefor. The answer admits the making of the written contract and the sale and conveyance to Hansen as alleged, but insists that such sale was in no way effected or consummated through or by the agency or efforts of the plaintiff, and alleges that it was effected solely through the agency and efforts of A. & E. Conrad, in Milwaukee. At the close of the testimony the court granted a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The court properly excluded testimony tending to prove that, soon after the plaintiff made the contract with the defendant, he interviewed nine or ten persons in respect to selling to them the farm, or some part of it, and that he secured an offer from other parties to pay a greater amount than paid by Hansen, but which offers were rejected by the defendant. Under the peculiar wording of the contract, the defendant was only to pay the commission "*on sale of*" the "farm, or any part of it, at a price *accepted by*" *her*, and to the "party to whom" the plaintiff had offered the farm for sale. She only "accepted" the price paid by Hansen, and she made no sale to any one except Hansen; and hence, if she can be held liable to the plaintiff at all, it can only

be on the sale to Hansen. The court properly held that "this action stands upon the contract." One of the questions mentioned by the court as arising under the contract was whether the plaintiff "did offer the farm to any one who afterwards purchased it." The plaintiff positively testified that he did offer the farm to Hansen within sixty days after the defendant signed the contract, and that in one conversation Hansen asked him what the farm could be bought for, and he told him he would be glad to submit an offer of $400 an acre, and explained to him why that was a reasonable figure, and that such conversation occurred during the winter of 1897–98, and during the spring of 1898. Hansen testified that the plaintiff offered the farm to him in the winter of 1897–98, and that he subsequently bought a part of it. So, there is no dispute but that the plaintiff offered to sell the farm to Hansen, who subsequently purchased it. Such undisputed evidence fully satisfied the question thus suggested by the trial court. But we do not rest our decision on that proposition. It is claimed that such sale was not consummated through the agency of the plaintiff, and was effected solely through the agency of the Conrads. It will be observed that by the terms of the contract the plaintiff was not bound to actually make the sale of the farm, or any part of it, in order to be entitled to his commission. Nor was it essential, under the contract, that he should actually secure an offer from the purchaser of the farm, or any part of it, which should be accepted by the defendant. Hansen testified that his son-in-law, Vogel, first informed him that the property was for sale, but that the plaintiff "was the first real-estate agent who offered this property to" him, and that Conrad subsequently offered it to him, and that afterwards he bought it. The agency of the Conrads did not preclude the agency of the plaintiff. The answer expressly admits that the defendant "employed the plaintiff as her agent to *assist* her in selling the land de-

scribed." The written contract seems to imply the same thing.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

ROONEY, Plaintiff in error, vs. THE State, Defendant in error.

May 24—June 20, 1901.

Appeal and error: Record: Bill of exceptions.

1. Papers purporting to be a bill of exceptions, filed in this court but not attached to the record nor bearing the certificate of the clerk of the trial court, cannot be considered.
2. In the absence of a certificate of the trial judge that the bill of exceptions contains all the evidence, it will be presumed that there was sufficient evidence to sustain the verdict.

ERROR to review a judgment of the municipal court of Milwaukee county: EMIL WALLBER, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Churchill & Donovan*, and oral argument by *John F. Donovan.*

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

WINSLOW, J. The plaintiff in error was convicted in the municipal court of Milwaukee county of an assault upon one Krueger with intent to kill and murder, and was sentenced to imprisonment for fifteen years, and has sued out a writ of error. The only error alleged is that the evidence was insufficient to show that the plaintiff in error was in any way connected with the alleged crime. We cannot consider this question, for the reason that there is no bill of exceptions in the record. The record returned upon the writ

consists simply of the record of the preliminary examination, the warrant of arrest, the information, the judge's charge, and a copy of the minutes of the trial court. It is true that there appears to be on file a bundle of papers purporting to be a bill of exceptions in the case, but it is not attached to the record, nor does it bear the certificate of the clerk of the trial court. We cannot, therefore, consider it. It is a mere fugitive paper. Even were we to consider it as a bill of exceptions, it would avail the plaintiff in error nothing, because there is no certificate or statement of the trial judge that it contains all of the evidence, and, in the absence of such a certificate, the rule is familiar that it will be presumed that there was sufficient evidence to sustain the verdict.

We should have been spared considerable labor had our attention been called to the condition of the record by the attorney general upon the argument of the case, but we were left to ascertain the facts by our own investigations. It is the duty of the law officers representing the state to make careful examination of the record returned upon a writ of error, in order to see what questions it presents. This court should hardly be required to make such examination in addition to its other duties, which of themselves are sufficiently onerous.

By the Court.— Judgment **affirmed.**

HEMPTON, Plaintiff in error, vs. THE STATE, Defendant in error.

May 25 — June 20, 1901.

Criminal law and practice: Homicide: Insanity: Evidence: Verdict of sanity: Incapacity to form design to kill may be shown on plea of not guilty: Right of cross-examination: Opinions of nonexperts: Presumption as to continuance of insanity: Instructions: Degrees of guilt: Intoxication: Jury: Separation: Presumption of misconduct: Affidavits of jurors.

1. On the trial of the issue of insanity in a prosecution for a criminal homicide, it is proper to show on the part of the accused that he was adjudged insane and committed to the state hospital at a time previous to the homicide, and the facts on which the adjudication took place, and to that end to introduce in evidence the reports of the examining physicians.
2. The daily record of a patient at the hospital for the insane, required to be kept by sec. 561*q*, Stats. 1898, is admissible in evidence to show the mental characteristics of the patient while at the hospital in any judicial proceedings where the facts in that regard are material, under the general rule that a public record required to be kept for public purposes is admissible in a judicial proceeding where such matters are material.
3. Insanity is provable by circumstantial evidence mainly, all the acts and mental characteristics of the person whose sanity is in question, covering a considerable period of time prior to the particular time in question and thereafter as well, being material.
4. The verdict of the jury, on the special issue as to the sanity of a person charged with a criminal offense at the time of the alleged commission thereof, that he was sane, precludes further inquiry as to mental impairment at such time entirely excusing the accused from legal responsibility; but on the plea of not guilty, evidence is permissible tending to show a condition of mind — whether produced by the use of intoxicating liquor or any other cause — rendering the accused incapable of forming a specific intent to commit the crime of murder at the time of the alleged offense, and bearing on the character of the offense if he is guilty at all.
5. On the question of whether, because of an abnormal mental condition, the accused in a prosecution for criminal homicide was capable of forming a design to kill, a material issuable question arises involving mental condition, which may be evidenced by proof of

the use of intoxicating liquors or by any other adequate disturbing cause.

6. The right of reasonable cross-examination by leading questions is absolute. The denial of it is the denial of a valuable right, and, if prejudicial, constitutes reversible error.

7. A nonexpert witness may give opinion evidence as to the mental condition of a person if he is shown to have knowledge of facts regarding such person reasonably sufficient in the judgment of the court to enable him to form an opinion.

8. On the question of the competency of a nonexpert witness to testify under the foregoing rule, the decision of the court, if it does not transcend the bounds of reason, is conclusive.

9. Under the statutes of this state, after a person has been on parole continuously from the hospital for the insane for the period of two years or more, the adjudication upon which he was committed to the hospital is no longer *prima facie* proof of insanity.

10. The rule, independent of the statute, that a person adjudged insane continues so till the contrary is shown, is a rule of evidence, subject to reasonable change by legislative will. It does not apply to insanity other than that of a nature liable to be permanent.

11. Upon the trial of a person for murder, where the question of whether the accused caused the death of the deceased is disputed, it is error, though not necessarily reversible error, for the court to use language in instructions to the jury or in remarks upon the trial indicating that the accused took the life of the deceased.

12. While the court, in a prosecution for murder, should submit the case to the jury for consideration upon every phase of criminal homicide which the evidence in any reasonable view of it suggests, if the submission is made of one or more of the higher degrees of criminal homicide so that the jury will understand that if a verdict of guilty be not found as to one of them a verdict of not guilty should be rendered, a failure to submit lesser degrees of homicidal offense is not reversible error, though the better practice is to scrutinize the evidence with the greatest care and to resolve all reasonable doubts as to whether the evidence points to a particular degree of criminal homicide or not in favor of submitting such degree to the jury, and to submit the same whether it be requested on the part of the accused or not.

13. Evidence of voluntary intoxication of a person accused of the crime of murder has no significance as to murder in the first degree, unless the intoxication be such as to satisfy the jury that the accused, at the time of the homicide, was incapable of forming a deliberate intent to take the life of the deceased.

14. The separation of the jury in a capital case is fatal to a conviction unless the court shall be satisfied, by evidence produced, that it was not followed by any misconduct on their part, or by any circumstance calculated to exert an improper influence upon the verdict.

15. From the mere fact of the separation of a jury in a capital case contrary to the rule above indicated, a presumption of prejudice of the accused arises, and such presumption cannot be satisfactorily overcome by the affidavits of the jurors themselves and the officers sworn to attend them that they were not prejudicially affected by the separation or by anything that occurred during the time of such separation.

16. The conduct of jurors while outside of the court room, impeaching their verdict, may be shown by their own affidavits.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The plaintiff in error was convicted of the crime of murder in the first degree. On July 27, 1898, about 5 o'clock p. m., Elizabeth Hempton, the wife of plaintiff in error, was shot through the head and instantly killed in the home occupied by him. For some time before such occurrence the deceased and her husband had not lived happily together. She commenced a suit against him for divorce, which was discontinued, and the parties resumed living together. About one year thereafter, and shortly before the alleged homicide, she again left her husband and commenced an action for divorce. At the time of the occurrence in question *Hempton* was engaged in the business of draying and maintained a home, his sister being his housekeeper. At such time, while *Hempton* was away at his work, his wife visited his home and took therefrom some things which she claimed were hers. About noon of the same day she made a second visit to the house and took away some things, *Hempton* being at home on such occasion. He then told his wife to come the next day for the balance of her things. During the afternoon, in his absence, she made several visits to the house.

Hempton returned home between 4 and 5 o'clock p. m. and directed his daughter, a girl then about ten years of age, to go to a neighbor's near by to request her mother, who was there, to come to his house. The girl did as directed, and Mrs. Hempton promptly complied with the invitation. While the girl was gone upon such errand *Hempton* walked the floor of the kitchen. When Mrs. Hempton arrived the two went into the front room of the house, there being a sitting room between such room and the kitchen. The sister remained in the kitchen. The little girl was outside the house. Angry words were soon heard to pass between *Hempton* and his wife. She stamped her foot and gave the lie to her husband, when immediately a revolver was discharged twice in the room. Almost immediately thereafter *Hempton* returned to the kitchen with a revolver in his hands. The little girl saw her mother in the front room soon after the first shot was fired, lying on the floor apparently unconscious, and saw her father turn the revolver upon himself and discharge it.

Soon after such occurrence officers of the law visited the house, where they found the dead body of Mrs. Hempton on a chair in the kitchen, also found some bedclothes and a pillow covered with blood in the front room, and a revolver, stained with blood, lying on the bureau in the bedroom, two of the chambers thereof being empty. They arrested the plaintiff in error. He had a wound on the right temple and one back of and a little above the ear on that side of his head, both apparently caused by a bullet fired from behind. A bullet entered Mrs. Hempton's head on the right side just in front of and above the ear, passed through the skull, and lodged in the scalp directly above the ear on the left side of the head. The side of her head where the bullet entered was powder burned.

The day after the alleged homicide *Hempton* said that he thought he would scare his wife and that he guessed he

scared her more than he intended. He was placed on trial on the charge of murder in the first degree. The theory of the state was that he deliberately shot his wife and then turned the revolver upon himself and inflicted the wounds on his head that have been mentioned. The theory of the defense was that *Hempton* was insane and irresponsible at the time of the alleged homicide, that the shooting of his wife was accidental, or that, if he did the deed and was criminally responsible therefor, he was guilty of some offense less than murder in the first degree because of his mind being in such a condition from partial insanity, or from drunkenness, or from uncontrollable passion at the time of the occurrence, that there was no premeditated design on his part to kill his wife. There was a special plea of insanity and a plea of not guilty.

The verdicts upon both issues were against the accused, he being found guilty of the highest offense of criminal homicide. Sentence was passed accordingly. Exceptions were taken to rulings of the court during the progress of and subsequent to the trial, which are considered in the opinion.

G. G. Sedgwick, for the plaintiff in error, argued, among other things, that in criminal cases, and especially in capital felonies, where members of the jury are permitted to read editorial comments unfavorable to the accused, a new trial ought always to be granted. *People v. McCoy*, 71 Cal. 395; *Carter v. State*, 9 Lea, 440; *Walker v. State*, 37 Tex. 366; *People v. Stokes*, 103 Cal. 193; *Farrer v. State*, 2 Ohio St. 54; *Mattox v. U. S.* 146 U. S. 140; *State v. Walton*, 92 Iowa, 455; *Cartwright v. State*, 71 Miss. 82; 17 Am. & Eng. Ency. of Law (2d ed.), 1248, subd. l. If the jury separate in a capital case, there must be a new trial unless it be shown affirmatively by the state that no harm results. Thompson, Trials, § 2549; *Keenan v. State*, 8 Wis. 132; *Rowan v. State*, 30 Wis. 129; *State v. Dolling*, 37 Wis. 396. The use of in-

toxicating drinks by the jurymen and by the officers in charge was misconduct warranting a new trial. *Roman v. State*, 41 Wis. 316; *Jones v. State*, 13 Tex. 168, 179; *Brown v. State*, 137 Ind. 240; *State v. Baldy*, 17 Iowa, 39; *People v. Douglass*, 4 Cow. 26–36. Where drinking is attended with other acts of misconduct, as the separation of the jury, the verdict will the more readily be set aside. *Creek v. State*, 24 Ind. 151; *Davis v. State*, 35 Ind. 496–499; *State v. Prescott*, 7 N. H. 289; *Jackson v. Jackson*, 40 Ga. 150; Thompson, Trials, § 2567; *Studley v. Hall*, 22 Me. 198.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general. They contended, *inter alia*, that a verdict should not be set aside for the misconduct of the jurors in drinking intoxicating liquors, where there is no reason to suspect that it influenced the verdict. *Roman v. State*, 41 Wis. 312; *Clifford v. State*, 58 Wis. 477; *Grottkau v. State*, 70 Wis. 462; *State v. Jones*, 7 Nev. 408; *Tuttle v. State*, 6 Tex. App. 556; *State v. Livingston*, 64 Iowa, 560; *People v. Van Horn*, 119 Cal. 323; *People v. Leary*, 105 Cal. 486; *People v. Sansome*, 98 Cal. 235. See, further, *State v. Cucuel*, 31 N. J. Law, 249; 12 Ency. of Pl. & Pr. 607; *Rowe v. State*, 11 Humph. 491; *Browning v. State*, 33 Miss. 48; *Doyal v. State*, 70 Ga. 134; *State v. Fairlamb*, 121 Mo. 137; *State v. Hunter*, 18 Wash. 670; *Jones v. People*, 6 Colo. 452.

MARSHALL, J. Many propositions are presented for consideration in the brief of counsel for plaintiff in error, some of which are not considered of sufficient consequence to call for special mention in this opinion, though each, it is believed, has been considered with all the care which in any view of the case the same requires in order to do justice to the accused.

Evidence was given on the special issue to the effect that tho accused was duly adjudged insane in January, 1884, and

committed to the Northern Hospital for such unfortunates, and that he was discharged therefrom in March, 1885. Proof was also made that in September, 1885, he was again duly adjudged insane, and was thereupon committed as before, and that in December, 1885, he was again discharged on parole. On the trial of such issue the reports of the examining physicians in the judicial proceedings which resulted in the commitments mentioned, and the daily record of the accused while he was at the hospital, kept in accordance with the statute (sec. 561*q*, Stats. 1898), were offered in evidence generally, and were excluded so far as they showed the mental characteristics of the accused at the times referred to therein, or anything other than the facts as regards his having been twice adjudged insane, committed accordingly, and discharged as before indicated. The adjudications were not conclusive in favor of the accused except that he was insane when they were made, but the nature of his insanity at that time was proper to be shown in connection with all the circumstances of his life indicating his mental characteristics. The adjudications, without the grounds upon which they were made, so far as explaining the condition of the accused long after the presumption of insanity arising therefrom ceased, were of little value. The records kept at the hospital, by a rule of evidence too familiar to require discussion, were competent evidence of the facts which they purported to show. All public records which are by law required to be kept for the purpose of preserving evidence of transactions and occurrences for public uses, are competent to establish such transactions or occurrences when they are material in a judicial proceeding. *O'Mally v. McGinn*, 53 Wis. 353; *Jackson v. Astor*, 1 Pin. 137; *Thornton v. Campton*, 18 N. H. 20; 1 Greenl. Ev. § 483; Jones, Ev. § 520; Stephen, Ev. art. 34. In *Townsend v. Pepperell*, 99 Mass. 40, the record of the condition and treatment of a patient at a public hospital for the insane, produced as evidence of

the facts therein referred to, was held admissible on the issue of insanity when the same was produced forty years after it was made. That the facts referred to in the records under consideration were proper, there can be no question. Insanity is rarely susceptible of proof by direct evidence. Circumstances and acts of the subject, extending over a considerable period of time, are generally considered material. It is by such means almost invariably that insanity is established. 2 Greenl. Ev. § 371. Whether the exclusion of the evidence was sufficiently prejudicial, in view of other evidence in the case, to work a reversal, we need not decide, as there are other questions to be hereafter considered that are decisive of the case.

Evidence was offered, on the issue raised by the plea of not guilty, as to the mental characteristics of the accused, for the purpose of showing that he was afflicted with a disordered mind, not amounting to insanity in the legal sense, but of such a character as to be entitled to consideration on the question of the degree of the offense of criminal homicide of which he was guilty, if guilty of any. The court ruled that the verdict on the special issue was conclusive as to every phase of insanity, and that no evidence of the mental condition of the accused at the time of or before the commission of the alleged offense was admissible except that which existed at the time of the offense, caused by intoxicating liquor. No doubt the statute permitting the special plea of insanity to be interposed with the plea of not guilty, and the trial of the issue upon the special plea to take place first, and requiring the jury, in deciding it, to render a verdict of not guilty if satisfied that the accused was insane, in the legal sense, at the time of the commission of the alleged offense, or they entertain a reasonable doubt on the question, contemplates an entire separation of that subject from the issue raised by the plea of not guilty, and that the trial and final disposition of the special issue by

the verdict shall preclude any further inquiry in respect thereto. But that goes only to the question of legal insanity excusing the accused from all responsibility for his acts; not to that lesser degree of disordered intellect rendering a person incapable of forming a design to kill, and bearing on the grade of his criminality. The learned trial court erred in ruling that no abnormal mental condition was material upon the general issue of not guilty, other than that produced and existing at the time of the alleged homicide by the use of intoxicating liquor. The same rule that permits proof of intoxication as bearing on the question of malice, permits evidence of a disordered mental condition, however produced. The important circumstance is the disordered intellect, not the means by which it was produced. *Andersen v. State*, 43 Conn. 514; *Hopt v. People*, 104 U. S. 631; *Terrill v. State*, 74 Wis. 278. In *Terrill v. State* this court passed upon this very question, saying, in effect, that drunkenness, together with other causes affecting the mind, is proper for the consideration of the jury in determining the grade of the offense in a prosecution for murder. The rule was stated by quoting with approval from the opinion of Mr. Justice GRAY in *Hopt v. People*, *supra*, thus:

"When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

Ella Hempton, who at the time of the trial was about eleven years of age, the daughter of the accused, was one of the two persons who were near the scene of the alleged homicide at the time of its occurrence. She was one of the principal witnesses upon whom the prosecution relied to establish the guilt of the accused. She testified to seeing her father standing by the coal stove in the sitting room, to ob-

serving him there take something from his pocket, to thereafter observing him and her mother in the front room, the mother being in the corner of the room on the floor and apparently unconscious, to immediately thereafter seeing her father in the kitchen with a revolver in his hand, and seeing him turn it upon himself and discharge it. Her evidence was very damaging to the defense. When counsel for the accused attempted to cross-examine the girl, he was denied the usual privilege of propounding leading questions. In fact, the right of cross-examination of the witness was in effect denied to the accused. Upon what theory the court ruled in that regard we are unable to understand. We must assume that the learned trial judge knew that the accused had the absolute right to have every witness who testified against him subjected to the ordinary test of cross-examination in the usual way, so long as that right was not abused, and that the right to ask leading questions on cross-examination, as a general rule, is just as absolute as the right of cross-examination itself. The proceedings upon the trial at this point seem to have been highly prejudicial to the accused. When his counsel attempted to cross-examine the girl in a proper manner, the court said: "Why can't you ask what did she say? What is the reason you have got to put leading questions to that child as you would to a witness of thirty-five or forty years?" "You will not be permitted to do it any more. You will have to question her about as the state did. You didn't want them to lead her and I won't let you lead her." To that counsel for the accused very courteously and properly replied, "I only want to lead her so as to get at the facts." That was followed by the court's saying: "You can get the facts by asking what she heard and what she saw." "If you can't you will have to get along without leading questions." "This child is only eleven, and if the state cannot lead her you cannot lead her." Counsel replied: "We are not to take what a

child eleven years old says any more than if she was forty. We have a right to know on what she bases—" At that point the court broke in with the exclamation: "You can't put suggestive questions to her. She is his child and you cannot put suggestive questions to her." Counsel further firmly but courteously insisted upon his right to cross-examine the witness in the ordinary way, excepting to the rulings of the court, and saying that they, and the manner in which they were made, were prejudicial to the accused, that counsel had given no occasion therefor, and was only disposed to proceed fairly to elucidate the truth, whereupon the court said: "The court has ruled that you cannot ask leading questions of this child of eleven years of age, and whatever you get by way of examination you must get by putting questions to her about the same as you required the state to do." There is more of the same sort. We will not further quote from the record in regard thereto. Enough has been presented to show that the rights of the accused, at an important stage of the trial, were so violated that we must conclude that, for such error alone, he did not have a fair trial. No doubt a trial court has some discretionary power to restrict the putting of leading questions to a witness on cross-examination, but it by no means goes to the extent of justifying an arbitrary denial of the ordinary privileges of cross-examination upon the mere ground of the youth of the witness.

Exception was taken to the competency of several non-expert witnesses called by the state on the special issue, to give opinion evidence as to the mental condition of the accused. Evidence of that kind is admissible when based on facts within the knowledge of the witness. Proof of such facts to the satisfaction of the trial court, so long as he rules within reason, is conclusive on the question of competency. Wharton, Cr. Ev. § 357. We are unable to discover any good ground for holding that the court transcended the bounds

of reason in the rulings under consideration. Each of the witnesses gave evidence showing some familiarity with the life, habits, and peculiarities of the accused, and upon that the court passed judgment on the question of competency.

The court instructed the jury on the special issue, in effect, that after the expiration of two years from the discharge of a patient from a hospital for the insane, without his having been recalled, the presumption of insanity as to such person, because of the adjudication upon which he was committed to the hospital, ceases, and that he is presumed to be sane; and that such rule applied to the accused. A law to that effect was passed in 1897 (ch. 319, Laws of 1897). It was prospective in its terms, so did not apply to the accused, who was then on parole. By ch. 327, Laws of 1899, passed after the alleged homicide, the act of 1897 was amended so as to affect all persons on parole, whether paroled prior to the passage thereof or thereafter. Counsel for plaintiff in error insists that he was entitled to the benefit of the presumption of insanity in his favor existing at the time of the alleged homicide. We are not familiar with any authority to sustain that proposition. The doctrine, once insane always insane till the contrary is established by evidence, is not and never was an absolute rule. It never applied to occasional or intermittent insanity, which was evidently the malady with which the accused was suffering on the two occasions when he was committed for treatment to the hospital for the insane. It is only where the insanity is once proven to exist and to have been of the character likely to be permanent that the rule contended for properly applies. *State v. Wilner*, 40 Wis. 304. Further, at most it is a mere rule of evidence, and as such subject to reasonable changes by the legislative will.

The court several times, in the course of his instructions to the jury upon both issues, spoke of the accused as if he were unquestionably the cause of the homicide; that he

killed his wife. Exceptions were taken thereto. We are not prepared to say on the record that prejudicial error was thereby committed, but it seems that the question of the cause of the death was at issue and that the court should have as carefully avoided expressing any opinion on that question as on any other at issue in the case which the jury were to decide. In a criminal case the accused is entitled to have every issue of fact passed upon by the jury. He has a right to stand upon that and put the prosecution to the proof upon every essential of the offense of which he stands charged, and to have his discharge upon the evidence by order of the court, or the issues of fact submitted to the jury on the evidence, without any suggestion from the bench as to where the truth lies. The better practice is to strictly regard that right at every step in the trial of such an important case as this, and not to take any chances of a conviction having to be sustained by invoking the doctrine that only prejudicial error can disturb it.

Exceptions were taken to the refusal of the trial court to so submit the case to the jury as to permit them to find a verdict of manslaughter in the first or fourth degree. It is unquestionably the duty of the trial court to submit to the jury in a case of this kind, by proper instructions, every phase of criminal homicide to which the evidence, in any reasonable view of it, applies. Failure so to do is not necessarily prejudicial and reversible error. It has often been held that where the jury are instructed, in effect, that the accused is guilty of some one of the higher degrees of criminal homicide, or not guilty, if error is thereby committed in that the evidence would admit of a conviction of some lesser degree of homicidal offense than the degree or degrees submitted, the error is favorable rather than unfavorable to the accused. *Dickerson v. State*, 48 Wis. 288; *Winn v. State*, 82 Wis. 571; *Fertig v. State*, 100 Wis. 301. However, it does not seem necessary to invoke that rule here, but we will say

in passing that it is the better practice to always so try a case that there will be no necessity for invoking it,— to scrutinize the evidence with the greatest care, view it in the most favorable light it will reasonably admit of from the standpoint of the accused, and, whether requested or not, to submit to the jury every phase of criminal homicide to which it can be said reasonably to apply. We assume that the learned trial judge endeavored to do that and decided that there was nothing but mere conjecture upon which to base a verdict of manslaughter in either the first or fourth degree. We are unable to say that he was wrong, with sufficient clearness to condemn the rulings under consideration. The evidence is undisputed that the accused and his wife were in the room together when the alleged homicide occurred, and that no one else was present; that he had a revolver in his hand just before the shooting and was seen with it in his hand immediately thereafter; that no noise was made in the room prior to the shooting except that caused by the conversation of *Hempton* and his wife; that some angry words were spoken by the woman, which were immediately followed by the report of a revolver. The place where the bullet entered the woman's head and the direction it took were such as to rather repel the theory of accidental shooting. The conduct of the accused immediately after the shooting was not consistent with such theory. The revolver was held so near the woman's head that it was discolored by the powder. The theory of accidental shooting seems to require conjecture that the accused pointed the pistol at his wife's head, holding it very near thereto, and that the weapon was, while in that position, accidentally discharged. There is no evidence, seemingly, to reasonably sustain any such theory; so we cannot say the trial court erred in so deciding and that the evidence did not point to any reasonable theory of accidental shooting. There was no suggestion of accident in the evidence, except that the

accused, soon after his arrest, stated that he tried to scare his wife and that he guessed he scared her too much. *State v. Hammond*, 35 Wis. 315, *Pliemling v. State*, 46 Wis. 516, and *Terrill v. State*, 74 Wis. 278, are authority to the proposition that there must be some evidence pointing with some reasonable degree of definiteness to guilt in a particular degree to justify submission of a case to the jury upon the theory that verdict of guilty in such a degree is proper. It would seem that no authority to that proposition is necessary.

On the subject of the significance to be given to the evidence that the accused was intoxicated at the time of the homicide, the jury were instructed:

"If you find from the evidence that he fired the shot which killed his wife, and if when he did so he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated intent to kill her, then you should consider the question of intoxication and you cannot convict him of murder in the first degree. But if he was able to form that intent to kill, wilfully, deliberately, and premeditatedly, when he fired the shot, then you must have nothing more to do with the question of his drinking and you should give it no further thought or consideration in the case, for then it cuts no further figure."

He further charged the jury that drunkenness was no excuse for crime and could not reduce the degree of a homicidal offense below that of murder in the first degree, if, notwithstanding the condition of drunkenness, the wrongdoer was capable of forming a deliberate intent to commit the homicide. Counsel for plaintiff in error confidently insists that such instructions were wrong. They are substantially in accord with the decisions of this court and the prevailing rule on the subject. In *Bernhardt v. State*, 82 Wis. 23, the following instruction was approved as a strictly accurate statement of the law:

"If you shall find from the evidence in the case that this defendant, at the time he struck the blow, was in such a condition from the use of spirituous liquors that he was inca-

pable of forming an intent to kill, then you may consider the question of intoxication. The question simply is, in short, Was he at the time in such a condition mentally as to be incapable of forming this premeditated design to effect the death?"

The court remarked: "This instruction was direct, clear, and to the point, and the jury could understand it. The point is, Was he so intoxicated that he could not form the intent or the premeditated design to kill?" The same rule is laid down in *Cross v. State*, 55 Wis. 261, and *Terrill v. State*, 74 Wis. 278. In *People v. Rogers*, 18 N. Y. 9, cited by this court in *Bernhardt v. State*, *supra*, there is a very full discussion by two justices of the significance to be given, in a prosecution for murder, to evidence of intoxication of the accused at the time of the homicide. Mr. Justice HARRIS said: "It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offense, if committed by a sober man, would be murder;" that to have that effect the defendant must be "so far deprived of his senses as to be incapable of entertaining a purpose or acting from design." Courts have been very slow to break down the old common-law doctrine as regards the effect of voluntary intoxication of a person at the time of the commission of a criminal offense by him. Formerly it was held to aggravate rather than to mitigate the offense. Now, if from passion, stimulated by intoxication, or from any other cause, a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible, he is uncontrollably moved thereby to and does wrongfully kill another, he cannot be convicted of murder in the first degree. *Clifford v. State*, 58 Wis. 477. It is the condition, no matter how caused, overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide. If reason, notwithstand-

ing the intoxication or other disturbing cause, be not so completely dethroned, so to speak, but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause.

After the close of the trial counsel for plaintiff in error moved the court to set aside the verdict on the special issue as well as the one on the issue of not guilty, and grant a new trial because of mismanagement and misconduct of the jury. Such motion was supported by affidavits of jurors, of clerks and boarders at the hotel where the jurors took their meals and lodged during the trial, and of other persons, to the effect that the proceedings of the trial were from day to day published in newspapers with comments unfavorable to the accused, which the jurors were freely permitted to read; that among such comments was one made after the verdict on the special issue and before the commencement of the trial on the issue of not guilty, commendatory of the jury for having defeated a "lawyer's trick" to clear a murderer; that the jurors took their meals and spent their evening and morning hours and lodged at a hotel; that while there they were permitted to go about the hotel office, into the barroom and other public places of the building, and to mingle and talk with the people the same as other guests; that they divided into parties in the evening, some playing cards for drinks in the hotel barroom, one of the officers and one or more outsiders associating with them, while others were in the hotel office mingling with the people; that they ordered and partook of intoxicating liquor at the end of each game of cards, and went singly and in parties to the hotel bar and drank liquor without restraint and without care to avoid associating with outsiders; that they lodged at night in four rooms which did not communicate with each other nor with the room occupied by the officers who were charged with attending them; that they retired at night and got up

in the morning singly and in parties with perfect freedom, and went to their morning meal singly or together at their pleasure; in fact, that they conducted themselves at the hotel the same as other persons, talking with outsiders and permitting outsiders to talk with them; that they had ample opportunity to so talk about the case and to hear conversations between outsiders in respect thereto, and to become fully conscious of public opinion in respect to the trial and the guilt of the accused; that part of the jurymen visited a barber shop in company with an officer, and there sent for and drank intoxicating liquor; that the sheriff, who was not sworn to take charge of the jury, took them out for a ride and that they stopped at a wayside saloon and partook of liquor; that such sheriff and one of the officers sworn to take charge of the jury took them to a baseball game, where there were some manifestations by people present well calculated to be interpreted by the jury as approval of their verdict on the special issue, which had theretofore been rendered; that after the decision upon the special issue jurors talked with persons at the hotel in respect to having to stay to hear the case through; that the jurors mingled with the people at and in the vicinity of the court house at times when the court was not in session, and that, generally, they were not kept together when outside the court room so as to interfere with their free communication with the people and free indulgence in intoxicating liquor.

In opposition to the motion, affidavits of jurors were presented, to the effect that they neither talked with any one nor allowed any one to talk with them about the case during the progress of the trial, nor heard anything said which affected their verdict except what they heard in the presence of the court; that they partook of intoxicating liquor in small quantities, but not so as to affect them; that they did not partake of intoxicating liquor at all while deliberating upon the case; that they read the newspapers but

were not affected thereby; that they were not out of the sight of the officer or officers in charge of them during the trial; that there were occasional separations, but that in each case an officer was in attendance upon the juror or jurors who left their fellows, and an officer was also in attendance upon those who remained. The officers who attended the jury testified to the same effect. The court denied the motion upon the ground that, while the conduct of the jurors was not what it should have been, upon all the proofs presented, excluding affidavits of the jurors presented in support of the motion, and from his personal knowledge of the jurors, it affirmatively and satisfactorily appeared to him that no improper influence reached the jury and that nothing was done by them of an improper character which prejudiced the accused.

It appears that the court, in deciding the motion as above indicated, did not consider the affidavits of the jurors presented to impeach their verdict, but remarked that he was unable to see, in such rejected affidavits, anything that would call for a different conclusion from that reached. It is a well-settled principle of law that affidavits of jurors cannot be used to impeach their verdict, but that rule applies only to affidavits concerning their conduct in court or when deliberating upon the case. Their conduct outside the court room may be established by their own affidavits for the purpose of impeaching their verdict. *McBean v. State*, 83 Wis. 206; *Peppercorn v. Black River Falls*, 89 Wis. 38; *Manix v. Malony*, 7 Iowa, 81; *Hefferon v. Gallupe*, 55 Me. 563; *Harris v. State*, 24 Neb. 803; *Rush v. St. Paul City R. Co.* 70 Minn. 5; *Mattox v. U. S.* 146 U. S. 140; 2 Thomp. Trials, § 2619. It follows that, in determining whether there was error in deciding the motion, the affidavits of the jurors as to their conduct outside the court room must be considered with all the other proofs bearing on the question.

If it can be said that such gross misconduct on the part of a jury as took place upon the trial of this case can be passed over as not prejudicial to the accused, upon the mere affidavits of the guilty members of the jury and their associate guilty officers, mostly to the effect that the jury were not prejudiced by such misconduct, the constitutional right to a trial by jury with substantially the common-law safeguards to prevent a miscarriage of justice, must be considered as having been effectually laid aside. True, the courts have gone a great way in sustaining verdicts, even in capital cases, notwithstanding misconduct of the jury, upon a satisfactory affirmative showing that their impartiality and the result of their labors were not affected thereby. But we venture to say that no case can be found, certainly none that has the approval of this court, which approaches the one before us. There seems to be a growing tendency to looseness in the management of juries in important cases, which calls loudly for a check if not for a substantial reform, if judicial administration is to be kept above suspicion as regards weighing out justice with the highest attainable degree of certainty. At common law, in the trial of capital cases, the jury were required to be kept together from the time they were charged with the case till they were discharged by order of the court, and to be kept secluded from all outside influences of every nature calculated to interfere with their impartiality. They were not allowed to mingle and converse with the people, or have opportunity for reading newspaper or other accounts of the trial or be influenced by public opinion for or against the accused, or to indulge in the use of intoxicating liquor. The constitution, in preserving the right of trial by jury, preserved it with its ancient safeguards, and any infraction thereof of a nature calculated to substantially impair the right cannot properly receive the sanction of the court.

In most cases of the importance of the one before us,

where misconduct of the jury was held not to constitute reversible error, there was but one or a few trifling transgressions which happened by mere thoughtlessness and which were shown with a high degree of certainty not to have affected the minds of the jurors one way or the other in the case. In *Keenan v. State*, 8 Wis. 132, there were two transgressions, one juror being permitted to go to his home and remain all night, and one to go to the depot on business. There being no affirmative proof that such separations worked no harm to the defendant, a new trial was granted. The court laid down the rule, which has since been consistently followed, that where the jury has been permitted to separate in a capital case "unless it appears that the separation of the jurors was not followed by improper conduct on their part, nor by any circumstance calculated to exert an improper influence on the verdict, the verdict should be set aside in case of a conviction." In *State v. Dolling*, 37 Wis. 396, the court permitted the jury to separate at meal times. The defendant was convicted of manslaughter in the third degree. On the motion to set aside the verdict upon the ground that the jury were allowed to separate during the trial, affidavits of all of them and of the officers who attended them were read, to the effect that during the separations nothing improper occurred, that they followed the directions of the court and neither talked with any one about the case nor allowed any one to talk with them, that they did not hear the case discussed during such times, and that nothing occurred during the separations which could or did prejudice them in the case. The question was certified to this court, whether a new trial should be granted under such circumstances. In deciding the case it was said, in effect, that the court was not inclined to give much effect to the exception to the general rule that jurors should not be permitted to separate in a capital case; that when jurors are allowed to transgress the rule requiring them to be kept to-

gether in such a case, they are liable to be subjected to such an infinite variety of improper influences and to become unconsciously biased thereby, that the only safe way is not to permit them to separate at all; that a juror is likely to be unconsciously guilty and to conscientiously deny his guilt, so that in the very nature of things the affidavits of jurors that they were not affected in the case by anything that occurred during the time of their separation, should not be considered of itself sufficient to overcome the presumption of prejudice against the accused arising from the violation of his right to have them kept secluded from all outside influences. The separation of the jury there under consideration, it should be remembered, was by express permission of the court under an admonition as to their conduct, and all of them testified that they strictly complied therewith, and there was no proof to the contrary. Nevertheless, this court held that the violation of the rights of the accused was too important to be passed over as not prejudicial to him, in the absence of satisfactory proof to rebut the presumption of prejudice arising therefrom except that of the jurors themselves and the officers who attended them. In *Roman v. State*, 41 Wis. 312, one of the jurors obtained some intoxicating liquor for himself and gave some to several of his associates. Proof was made by the affidavits of the jurors that only a few of them knew of the liquor being obtained and that those who drank of it were not affected thereby. The court held that the rule laid down in *Keenan v. State* was satisfied, but said that the doctrine in this state is that 'if upon all the proofs presented to rebut the presumption of prejudice arising from misconduct of a jury in a capital case there remains reasonable ground to suspect that the misconduct may have influenced the verdict, the required proof is wanting and the verdict should be set aside.'

From the foregoing it will be seen that the law governing the subject under discussion is so well settled for this

state that it is needless to look elsewhere for guidance. We must hold that to allow a jury to go to a hotel, mix with the people there without restraint, play cards in public places surrounded by other persons, go singly and in groups to the hotel bar and indulge in drinking intoxicating liquor, to have the free use of newspapers, and, generally, to be in and about a hotel and other places singly and in groups associated with other persons, even though within sight of attending officers, to all intents and purposes violates the spirit if not the letter of the rule that they must not separate during the trial. Such rule means that the jury must be kept together so far as practicable, in a body, secluded from association with all other persons and all outside influences.

It will be readily seen from what has been said that the showing made to rebut the presumption of prejudice arising from the gross misconduct of the jury in this case was clearly insufficient to meet the rule laid down in *Keenan v. State*, 8 Wis. 132, and to warrant the conclusion reached by the trial court. It was substantially the same kind of proof that this court said was wholly insufficient in *State v. Dolling*, 37 Wis. 396, while the presumption of prejudice, required to be met and overcome by it, was very much stronger. In the *Dolling Case* there was no proof of misconduct while the jury were separated. The separation was erroneously permitted by the court. In this case the separation of the jury was wholly unknown to the court except as it should have been inferred from the fact that they were permitted to go to a hotel for meals and to be lodged there without express directions to the officers to keep them apart from all outsiders. Not only do we have here misconduct of the jury in separating, but misconduct in reading the newspapers, associating generally with the people, and in other things of an improper character that have been detailed which were well calculated to exercise an improper influ-

ence upon their minds. The language of the exception to the general rule that a separation of the jury is fatal to a verdict of conviction in a capital case, is, as before indicated, limited to cases where it appears that the separation was not followed by improper conduct of the jurors or by any circumstance calculated to exercise an improper influence upon the verdict. It does not satisfy the exception for jurors to say that nothing occurred calculated to prejudice them. The court must be able to say that independently of the notions of the guilty parties, and must, before doing so, be satisfied beyond a reasonable doubt that such is the fact, keeping in mind how easily persons may be influenced by their environment without being conscious of it. The reading of the newspaper accounts and comments upon the trial was highly calculated to influence the minds of the jurors. The freedom with which they mingled with the people was well calculated to impress upon them the prevailing opinion as regards the guilt or innocence of the accused, and to give them a leaning in harmony therewith and they be wholly unconscious of it. Such conduct and the free indulgence in the use of intoxicating liquor were exceedingly inconsistent with the mental attitude which the law contemplates shall be maintained in dealing with the very life, as it were, of the person on trial, and interests of society of the highest moment as well. The practice of taking juries to a public hotel in such cases cannot be looked upon with favor. It is almost impossible to make officers and jurors so understand and appreciate their duties in a capital case that the jury can safely be permitted to have such liberties. The only really safe way to keep them free from all outside influences is to keep them together according to the spirit as well as the letter of the rule on the subject, to keep them absolutely free from all opportunity of mixing with outsiders, or from knowing the state of public opinion of the case, as expressed in the newspapers or otherwise. To do

that entails some hardships on the jurors, it is true, but no juror who fully appreciates the gravity of his situation in such a case and is fully worthy to enjoy the blessing of citizenship will complain. On the contrary, it is believed the more carefully a jury of such men are guarded from outside influence, the more respect they have for the law and the more oblivious they become, for the time being, to matters of mere personal comfort, and the more willing they are to forego such matters, to the end that their final result may be above all suspicion of having been influenced by anything but the evidence and the law given in court. Experience shows that a jury may be guarded to the very extreme here indicated without subjecting them to any discomfort prejudicial to health, and with their enthusiastic approbation and endeavor to second the efforts of the court to administer justice on the highest attainable plane of impartiality and certainty.

In deciding this case we have not taken into consideration the probability or improbability of the guilt of the plaintiff in error. Regardless of where the truth lies on that question, he is entitled to his day in court with all the safeguards for his protection guaranteed by the law. It is not improbable but that, in some cases, an accused person is so universally believed to be guilty in advance of his trial as to cause the trial court to unconsciously relax the care which should be exercised in all such cases. In truth, if greater care should be exercised in one case than in another, it should be in the one where, in advance of the trial, in the public mind, there is no reasonable doubt of guilt. As the certainty of guilt increases there should be increase rather than relaxation of care to conform to all the requisites necessary to a legal conviction, to the end that justice may not miscarry.

By the Court.— The judgment of the circuit court for Manitowoc county is reversed, and the cause is remanded to

such court for a new trial, for which purpose the warden of the state prison is directed to deliver the plaintiff in error, *James L. Hempton*, to the sheriff of such county, who is directed to safely keep the said *Hempton* in said custody until discharged therefrom or otherwise ordered according to law.

CAMPBELL, Plaintiff in error, vs. THE STATE, Defendant in error.

May 25 — June 20, 1901.

111 152
114 s198

Criminal law and practice: Second preliminary examination: Homicide:

111 152
115 s503

Court and jury: Evidence: Articles arousing prejudice: Prior statements of deceased: Excusable homicide: "Dangerous weapon."

1. Under sec. 4656, Stats. 1898 (giving the district attorney authority to hold a second preliminary examination of a person discharged on the first examination, if he "shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged"), when the district attorney, acting in good faith, has decided that the evidence discovered is sufficient for the purpose indicated, his conclusion is not open to review upon an objection, at the trial, to the legality of the second examination; nor is it jurisdictional that he should recite in the proceedings that he has discovered additional evidence.
2. Although on the first examination the magistrate has found that "there is not good reason to believe the offense stated in the complaint has been committed," such finding is not a final or conclusive adjudication and is no bar to a second examination under sec. 4656, Stats. 1898.
3. On a trial for murder it appeared that the deceased, whose death resulted from a fracture of the skull, had been struck on the right side of the head by a cane in the hands of one person and had also been struck by a chair in the hands of the accused. There was but one wound on the head, and that on the right side. The accused claimed that his blow did not reach the head. Medical experts testified that the cane, though light, might have caused the fracture. *Held*, that it was error to instruct the jury that there was and could be no evidence to warrant a conclusion that there was or was not a fracture resulting from the blow of the cane.

4. Articles likely to excite sympathy or arouse prejudice should not be admitted in evidence before a jury, unless the ends of justice demand it. In this case the admission of the hat of the deceased and of the chair with which the accused struck him is *held* not erroneous, and the admission of a portion of the skull, brain, etc., of the deceased, though of more doubtful propriety, is *held* not without warrant.

5. While the accused and an associate, as floor-managers at a dance, were attempting to quiet a disturbance, deceased came up and struck the accused a violent blow in the face and was then immediately struck with a cane by the associate and with a chair by the accused, one of the blows causing his death. On the trial of the accused for murder it is *held* that it was proper to exclude evidence, offered on his behalf, that deceased had said, in a saloon, "that if a row was expected and if they had any trouble, he wanted to be notified so he could take part in it,"—the accused having been in no way connected with such conversation and having had no knowledge of it prior to the affray.

6. In such case the accused was entitled to have the question of excusable homicide (under sec. 4367, Stats. 1898) submitted to the jury, the facts indicating that there was no intent to kill, that the combat was sudden, the provocation great and such that the jury might have believed it sufficient, the killing not done in a cruel or unusual manner, and the chair not necessarily a dangerous weapon.

7. In many cases the court may decide that a particular weapon was or was not a dangerous weapon, and when practicable it is the court's duty to do so. But when the weapon (in this case a chair) might be dangerous or not, according to the manner in which it was used or the part of the body struck, and the evidence on these points is in dispute, the question must be left to the jury.

ERROR to review a judgment of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

Plaintiff in error was informed against for murder, with one Daniel Collins. A separate trial was granted. Before pleading to the information, he entered a so-called "plea in abatement," based upon the following facts:

On December 20, 1896, one Joseph H. Clary, as justice of the peace, held an inquest over the body of Edward W. Hale, the deceased, and as a result the jury returned a verdict finding that Hale came to his death by blows inflicted either

by Collins or plaintiff in error. The justice issued his warrant for the arrest of the latter on the charge of murder, and conducted an examination. At the close thereof he made the following finding: "This court finds and adjudges that there is not good reason to believe the offense stated in the complaint here has been committed, and that there is no probable cause to believe said defendant guilty of said offense, and thereupon the said defendant is discharged, and the costs herein taxed to said county." Thereafter, and on February 26, 1897, a court commissioner, upon a complaint charging the plaintiff in error with having committed the same offense, issued his warrant, he was again arrested, and a second preliminary examination was held.

The plea sets up that the court commissioner had no right to hold such examination because of the adjudication of the justice aforesaid, and because the district attorney did not thereafter discover admissible evidence sufficient, in his judgment, to convict the accused, and that the district attorney who conducted the last examination was not the same person who conducted the former one. The claim was that the finding of the justice that no offense had been committed was *res adjudicata* and a bar to any and every subsequent arrest or examination for the offense charged in the information.

To this plea the district attorney made answer, setting up the first examination; the discharge of the accused; the discovery of new evidence; the issuing of a second warrant and arrest thereunder; the proceedings upon the examination; the fact that nine witnesses were sworn who had not given testimony on the first examination; the finding that a homicide had been committed under circumstances which constituted manslaughter in the fourth degree, and as to the probable guilt of the accused; and the holding to bail.

Both sides asked that the issue be tried by the jury, but the court ruled that the question at issue was one of law,

and proceeded to take proof of the facts alleged. The district attorney testified that new evidence had been discovered and several witnesses sworn who had not given testimony on the former examination, and spoke of such evidence in detail. The court finally overruled the plea. The accused entered a plea of not guilty, and the trial then proceeded.

The facts out of which the homicide arose may be briefly stated as follows: The accused attended a dance at Collins's Hall, in the village of Gratiot, and was one of the floor managers. Daniel Collins, his codefendant, was the other. The deceased, his brother, and one William Pinney, among others, were in attendance, and became somewhat intoxicated. About midnight, deceased's brother, Lewis Hale, got into an altercation with one William Buche. Both floor managers started towards the place to quell the disturbance. The evidence as to what occurred is somewhat in dispute. While the floor managers were attempting to preserve order, the deceased came up, and was hit on the right side of his head by Collins, with a cane weighing about thirteen ounces. This was followed by a blow from a chair in the hands of the accused. The chair weighed ten pounds and ten ounces. Only one wound was found on the head of the deceased. This was on the right side, and was of such a character as to cause death. The skull was badly fractured. The chief controversy was as to whether the blow with the cane or the chair caused death. The evidence of accused showed that he had just warned Lewis Hale that they did not want any disturbance, when the deceased came up and struck him a powerful blow in the face, bruising and injuring one of his eyes. He saw Pinney rushing for him, and he immediately grabbed a chair, and made a pass at the deceased, which he warded off with his left hand. The forefinger of the left hand of deceased was found to have been broken. He claimed that he raised the chair

because he thought deceased was coming for him again. It all occurred in a very short space of time, and the witnesses do not agree as to all the circumstances of the affray. Deceased was of muscular build, six feet tall, and weighing about 170 pounds.

It seems to have been conceded that the accused had no intention of killing deceased, and that as floor manager it was a part of his duty to preserve order. The defense was that the homicide was either justifiable or excusable. The court declined to submit the question of excusable homicide to the jury, but gave instructions as to justifiable homicide. The verdict was manslaughter in the third degree, and the sentence was two years in state prison. A motion for a new trial, on the ground of errors in the rejection and reception of evidence, errors in giving and refusing instructions, and for newly discovered evidence, was denied. A stay of proceedings was granted pending the prosecution of the writ of error by the accused.

For the plaintiff in error there was a brief by *Wilson & Martin* and *Spensley & Mollhon*, and oral argument by *R. J. Wilson* and *Calvert Spensley*. To the point that the adjudication of the justice on the first preliminary examination was in form and effect an adjudication that no offense had been committed, and as between the state and the plaintiff in error this adjudication was final and conclusive, they cited *State ex rel. Dilworth v. Braun*, 31 Wis. 600; *State v. Leicham*, 41 Wis. 573; *State v. Rindskopf*, 34 Wis. 217.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general. They contended, *inter alia*, that such an assault as was made in the case at bar is an assault with a dangerous weapon. *U. S. v. Small*, 2 Curtis, C. C. 241; *State v. Rigg*, 10 Nev. 284; *Blige v. State*, 51 Am. Rep. 628; *Miller v. State*, 106 Wis. 156, 164.

BARDEEN, J. The errors relied on for the reversal of this judgment may be grouped under the following heads: (1) overruling the plea in abatement; (2) improper remarks of the court; (3) improper rejection and reception of evidence; (4) failure to instruct the jury as requested, and the giving of improper instructions; (5) errors occurring after verdict.

1. Under this head the plaintiff in error first insists that his plea in abatement ought to have been submitted to a jury for trial. As said by this court in *Jackson v. State*, 91 Wis. 253, 265: "Whenever an answer to a plea in abatement raises an issue of fact which may be controverted by evidence *dehors* the record, then such issue is triable by jury. But whenever, as here, such issue is purely one of law, which has already been conclusively determined, then it is necessarily to be decided by the court." The answer of the district attorney raised no issue of fact on the plea, unless it can be said to have arisen by the allegation in the plea and the answer thereto that the second examination had been instituted by the district attorney without his having discovered "admissible evidence sufficient, in his judgment," to convict the accused, under sec. 4656, Stats. 1898. The claim on the argument was that the defendant had a right to have the jury determine whether the evidence said to have been discovered by the district attorney, so as to warrant a second examination, was sufficient for that purpose.

The section above cited gives the district attorney authority, when "the person complained of has been discharged for want of sufficient evidence to raise a probability of his guilt," to hold a second preliminary examination, if he "shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged." In this case the district attorney testified that such evidence had been discovered, and, in effect, that his judgment had been satisfied. When that appeared there was no issue of fact that

could be raised, under any proper construction of the statute. When, acting in good faith, he decided that the evidence discovered was sufficient for the purpose indicated, that closed the matter to all future inquiry. To say that his conclusion is open to trial by jury is to substitute the judgment of others for that of the officer designated by law and who was charged with a legal duty to make the determination. The law deals tenderly with the rights of accused persons, but we cannot believe that it was the legislative intent that the judgment of the prosecuting officer should thus be open to review, or that public policy demands that any such construction should be given to the statute.

A further contention in this connection is that the determination of the justice on the first examination, "that there is not good reason to believe the offense stated in the complaint herein has been committed," was an adjudication final and conclusive as between the parties, and a bar to any further prosecution. No authority in point was cited to sustain this proposition, and we do not think one can be found in the books. The argument seems to be based upon a misapprehension of the purpose of a preliminary examination. It is not a trial in the sense that the accused has been put in jeopardy. Unless prevented by statute, there may be as many successive examinations as the proper officials may choose to entertain. It takes the place of the former mode of investigation by a grand jury. It is but an inquiry into the facts to ascertain whether an offense has been committed and whether there is probable cause for charging the accused with the offense. The finding of the magistrate is not the ultimate determination of this matter as upon a trial. It is an investigation in the interest of public justice, with a view of ascertaining responsibility for crime and developing the particulars thereof. The law does not require the magistrate to make any formal adjudication either that an offense has been committed or that there is probable

cause to believe the accused guilty thereof. It simply requires him to hold the party to bail or commit him if those facts appear, and to discharge him if they do not. *State v. Leicham*, 41 Wis. 565–573. The district attorney is not bound by the finding of the magistrate. Sec. 4656 authorizes him to proceed again under the circumstances hereinbefore noted, and, if the accused has been held to bail or committed for trial, he may file an information for any offense which the facts disclosed on the examination warrant. Sec. 4653; *State v. Leicham, supra; Porath v. State*, 90 Wis. 527. Here the district attorney saw fit to institute a second examination. It was in no sense jurisdictional that he should have recited in the proceedings that he had discovered additional evidence, nor was it any bar to his action that the former magistrate had concluded "that the offense stated in the complaint" had not been committed.

2. One of the most important questions on the trial, from the standpoint of plaintiff in error, was whether the blow which caused the death of Hale had been inflicted by the cane in the hands of Collins or by the chair used by him. Upon being called upon to make a ruling as to testimony offered, the trial court made use of the following language: "I think the question for the jury in this case, if they are convinced beyond a reasonable doubt that a blow inflicted in the hall that night caused death, is to determine which blow." This was followed by further argument by counsel, when the court said: "There is no proof in this case, and evidently there can be none, that would warrant the jury in coming to a conclusion that there was or was not a fracture resulting from the blow of the cane. So that really they are asked to go outside of the realms of proof in the hypothetical question, so far as that particular is concerned." The testimony showed that two blows had been struck,—the first by a cane in the hands of Collins, upon the right side of the head, which caused the deceased to stagger; the sec-

ond was by a chair in the hands of the accused. There was but one wound on the head of deceased, and that on the right side. The accused claimed that his blow did not reach the head. Very many of the witnesses testify as to the blow with the cane. It is true the cane was light, weighing only thirteen ounces, yet the doctors say it was possible that the fracture found might have been caused thereby. For the court to make use of the language quoted in the presence of the jury, and to leave it unqualified and as expressing his opinion of the facts in the case, was certainly erroneous and prejudicial.

3. We have examined with care the various objections to evidence and the ruling of the court thereon, none of which appears to have been of sufficient gravity to warrant extended discussion. The admission of the hat of the deceased in evidence and of the chair used by the accused was not erroneous or harmful. We have more doubt as to the introduction of the portion of the skull, brain, and blood clot. They were certainly admissible, if deemed necessary to a thorough understanding of the force of the blow and the cause of death. Usually the medical testimony is sufficiently definite to cover all demands in this regard. The practice is to keep from the jury all those matters likely to excite sympathy or arouse prejudice, and it is only when the ends of justice demand it that the practice suggested should be overstepped. We cannot say that it was violated without warrant in this instance.

The court rejected the testimony of a witness who had heard deceased say, in a saloon, "that if a row was expected, and if they had any trouble, he wanted to be notified, so he could take part in it." The accused was in no way connected with the conversation, nor was its tenor made known to him before the affray occurred. It certainly could have had no effect on his conduct if he was ignorant of it. As between the accused and the deceased, there was no ques-

tion as to who began the difficulty. There was no real dispute in the testimony, or denial by the state that deceased first struck the accused a violent blow in the face. Such being the fact, we do not see how the admission of this conversation could have aided the case made. Sometimes statements and threats made by the deceased are admitted to show intent and his attitude towards the accused, as is noted in 3 Rice, Ev. § 363, but we do not think the facts disclosed in this case bring it within the lines of the decisions there noted.

4. Counsel for the accused requested the court to instruct the jury both as to justifiable and excusable homicide. The court submitted the most of the instructions requested as to justifiable homicide, but declined those requested as to its being excusable. It is insisted that there is ample evidence in the case to sustain the instructions requested. Sec. 4367, Stats. 1898, provides:

"Such homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual and ordinary caution and without unlawful intent; or by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken and without any dangerous weapon being used, and not done in a cruel or unusual manner."

The instruction requested covered the last two clauses of the section. The statute was intended to cover at least three or more distinct and separate situations. The homicide is excusable if committed under the circumstances stated while lawfully correcting a child or servant. It was also excusable if committed by accident or misfortune, in the heat of passion, upon any sudden and sufficient provocation; also upon a sudden combat, if no dangerous weapon was used and no undue advantage was taken. The several classes of cases are stated in a disjunctive form, and, under

ordinary rules of construction, each constitutes a class by itself, and if the facts bring the case within any one of them the killing was excusable. The facts already referred to indicate the lack of intent to kill on the part of accused. They show that the combat was sudden and unprovoked. Without warning, the deceased struck the accused a powerful blow in the eye, which staggered him and turned him to the left. Rapidly and instantly he picked up the chair and struck. If it be assumed that the chair struck the head of deceased and caused death, it cannot be said that such killing was done in a cruel and unusual manner. The provocation was great, and if the jury believed it was sufficient every demand of the statute has been met, unless it can be said the chair used under the circumstances in proof was a dangerous weapon.

In *Rowan v. State*, 30 Wis. 129, the instrument used was a chair, and, as in this case, only one blow was struck, and that upon the head of deceased. This court said: "The thing used was not necessarily a dangerous weapon, and the blow struck was not necessarily of a dangerous tendency." Ordinarily, what is a dangerous weapon is a question of law for the court (*Miller v. State*, 106 Wis. 156–167); yet the circumstances may be such, and the weapon used of such a kind, as to involve a question of fact for the jury. In *Kouns v. State*, 3 Tex. App. 13, it is said: "A chair is not necessarily a deadly weapon. Whether it is such must depend upon its size or weight, in connection with the manner of its use and the part of the person that is stricken by it." In *Sylvester v. State*, 72 Ala. 201, the court says: "A deadly weapon is one, not, as asserted in the instruction, a blow from which would *ordinarily* produce death, but one from which, as it was used, death would probably result; and an instrument or weapon used in inflicting injuries upon the person of another may or may not be esteemed deadly, according to the manner of its use and the subject on which it is used."

In discussing the same question, the court of North Carolina says that an instrument may be deadly or not, according to the mode of using it or the subject upon which it is used, and, generally speaking, the decision of the question is for the court. *State v. West*, 6 Jones, Law, 505. In a Missouri case the trial court refused to instruct the jury that "neither a pocketknife nor a brickbat is a deadly weapon, within the meaning of the law." The supreme court disposed of the question by saying: "Whether either was a deadly weapon was properly referred to the jury as a question of fact."

A review of the authorities leads us to this conclusion: In many cases the court may decide that a particular weapon was or was not a dangerous weapon, and when practicable it is the court's duty to do so. But when the weapon might be dangerous or not, according to the manner in which it was used or the part of the body struck, the question must be left to the jury. *U. S. v. Small*, 2 Curtis, 241; *State v. Dineen*, 10 Minn. 407; *Blige v. State*, 20 Fla. 742; *Dœring v. State*, 49 Ind. 56. In case the evidence is in dispute as to the manner of its use or as to the part of the body stricken, the question of fact must be determined before it can be said as a matter of law that it was or was not a dangerous weapon. Following the *Rowan Case*, we say that the chair was not necessarily a dangerous weapon. If the manner of its use had been perfectly clear and without dispute, the court might have decided whether it was or was not such, as a matter of law, in this case. But the evidence and inferences therefrom are not without dispute. In relation to the question of excusable homicide, we think the evidence was such that the court should have submitted that phase of the case to the jury, leaving them to say whether, under all the facts and circumstances, the chair as used was a dangerous weapon. The court submitted that question to the jury when charging in relation to manslaughter in the third degree, and we think properly. The error arose from failing to submit the

question of excusable homicide. He should have also told the jury what constituted excusable homicide, when considering the question of guilt under that degree of manslaughter.

5. The errors already discussed, being of sufficient gravity to work a reversal of the judgment, render it unnecessary to discuss the motion for a new trial on the ground of newly discovered evidence, or because of the alleged misconduct of one of the jurors.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

CASES DETERMINED

AT THE

August Term, 1901.

SHAW, Respondent, vs. GILBERT, Appellant.

111 165
111 19 7
111 18 9
f111 290

111 165
115 14258

111 165
117 13 41
117 14293

April 11—September 24, 1901.

Deceit: Obtaining credit by fraud: Pleading: Insolvency: Corporations: Capital stock not a liability: Reliance on false statements: Due care: Evidence: Court and jury: Instructions: Special verdict: Ambiguity: Purpose of false statements: Materiality: Damages: Value of claim against insolvent corporation: Stockholders' liability: Interest: Partnership: Right of action for tort: Survivorship.

1. A complaint alleging that plaintiff and another, since deceased, parted with valuable property in ignorant reliance upon false statements of the defendant, known by him to be false, and intended to induce plaintiff to so part with her property, states a cause of action, even though the demand for judgment includes certain elements of damages not recoverable.
2. Upon the question whether or not a person was insolvent, in the sense that his assets did not equal or exceed his debts, evidence of extreme and unusual acts and conduct indicative of financial embarrassment and distress, such as are the customary accompaniments and consequence of insolvency in fact and are not usual accompaniments of a contrary condition, is admissible as tending, in connection with other more direct evidence, to establish such insolvency; but such evidence should be submitted to the jury with cautionary instructions to consider carefully all circumstances and explanations before drawing an inference of actual inadequacy of assets, at fair and ordinary values, to satisfy the debts.
3. In determining whether or not a corporation is insolvent in the sense above stated, its capital stock should not be considered as a

liability, and instructions to the jury upon that point should be without ambiguity.

4. The question being whether plaintiff's firm exercised due care and diligence in the matter of extending credit to a corporation in reliance upon defendant's statements as to its financial condition, a witness, who had been the auditor of the corporation, testified that shortly after the time at which such statements were alleged to have been made he made a full showing of the affairs of the corporation to plaintiff's partner (since deceased), with balance sheet, inventory, etc., and full explanation of the facts. *Held*, that in submitting the case to the jury sufficient significance was not given to that testimony. The question of fact whether the auditor gave such information to plaintiff's firm should have been specifically submitted, either by direct question or by instruction that, if he did plaintiff could not be held to have exercised reasonable care in continuing to rely upon defendant's representations in conflict therewith.

5. Defendant having denied that he ever had any conversations with plaintiff's agent to whom he was alleged to have made the statements in question, the submission to the jury of questions which, in form, assumed that such conversations were had, is *held* confusing, even though accompanied by explanatory instructions; but whether a material error was thus committed is not determined.

6. Where plaintiff's agent testified positively that such conversations were had, the question was one for the jury, even though defendant's positive denial had some corroboration.

7. The inclusion, in a question of a special verdict, of several inquiries capable of answer in different ways is not a material error unless, measured by the answer, it leaves the jury's decision ambiguous and uncertain. Thus, the jury having found, in answer to other questions, that defendant made three several false representations, an affirmative answer to a further question as to whether plaintiff relied upon "such representations," leaves no ambiguity.

8. The answer to such question is equally sufficient to support a judgment whether the reliance was placed on one or on all of the false statements, they being each and all material.

9. A false statement relied on, and without which the transaction resulting in damage would not have been had, constitutes legal deceit, although it may not have been the sole motive or consideration moving the defrauded party thereto; and it is immaterial, therefore, whether or not he also relied on other unactionable statements.

10. If a false statement as to the financial condition of a corporation was made for the purpose of inducing a creditor to furnish additional materials to it, it is immaterial whether or not such statement was also made in part for the purpose of assuring the creditor that the then existing indebtedness would be paid.
11. In such a case, evidence showing that both parties had in expectation that the creditor was to continue furnishing materials to the corporation, and testimony that one of the assertions made was that such creditor might fill all orders of the corporation and extend its notes with perfect safety, were sufficient to carry to the jury the question of intent to influence the creditor's conduct in respect to future transactions.
12. Statements, made for the purpose of inducing extension of credit to a corporation, to the effect that it was solvent, that it had a large amount of unincumbered assets, and that its business was prosperous and profitable, are all material as matter of law, and should be so held in an action for the deceit.
13. A slight want of ordinary care is inconsistent with the reasonable diligence which, in order to a recovery for deceit, must have been exercised by plaintiff in relying upon the false statements; and refusal to so instruct the jury, when requested, is error.
14. In an action for deceit it was error to refuse to instruct the jury to the effect that the fraud could not be found from conjecture or mere inference but must be clearly proven.
15. A ruling of the court in respect to remarks of counsel, tending to convey to the jury the idea that a party might have offered in evidence letters written by himself containing self-serving declarations, is *held* erroneous.
16. For a deceit whereby plaintiff was induced to sell goods to an insolvent corporation, the price at which the goods were so sold, being shown to be their fair value, was the proper measure of damages, even though an ordinary measure of trade profit was included therein.
17. In such a case the value neither of the accounts for such goods nor of the notes received upon monthly settlements is material, prior to the time when, in accordance with the course of business contemplated by the parties, the plaintiff would be expected to demand and insist upon payment.
18. But the value, if any, of plaintiff's claim against the corporation upon the settlement of its affairs under an assignment for the benefit of creditors, should be deducted from the damages otherwise recoverable; and in estimating such value the liability of responsible stockholders of the corporation for stock issued to them with-

out consideration should be considered as an asset of the corporation, including, in such liability, interest upon the face value of that stock from the date of its issue.

19. After a partnership consisting of plaintiff and one H. had been induced by deceit to become a creditor of an insolvent corporation, plaintiff purchased, for full value, all of H.'s interest (being one sixth) in the firm and its assets, including the claim against the corporation. H. died, and thereafter plaintiff brought this action for the deceit. *Held*, that after the sale by H. to plaintiff there existed no joint right of action for the tort, and that plaintiff could not, therefore, recover, as survivor of two joint sufferers, the whole damage caused by the deceit, but could recover only her separate interest (five sixths) therein. CASSODAY, C. J., dissents.

20. One defrauded of money or valuable property is entitled to recover not only such money or value but also interest from the date of the deprivation; and when value and date are found by the jury the court should apply the law as to interest and not leave the recovery thereof to the discretion of the jury.

21. In an action for deceit whereby plaintiff was induced to give credit to an insolvent, interest on the amount of the loss can be recovered only from the date when, according to the contract and the customary or contemplated course of dealing, plaintiff was entitled to insist on payment from such insolvent.

APPEAL from a judgment of the circuit court for Eau Claire county: E. W. HELMS, Judge. *Reversed.*

For more than a year prior to February 1, 1893, the plaintiff, *Addie M. Shaw*, in association with George H. Hopper, under the firm name of N. Shaw & Co., was engaged in a foundry business at Eau Claire, where was located the National Electric Manufacturing Company, engaged in the manufacture and sale of electrical machinery, dynamos, generators, and the like, involving the taking of considerable contracts for the installation of electric plants. It was a corporation which had been organized, partly at least, to enlarge the business of the city, and many of the more prominent business men of Eau Claire were among its stockholders. The defendant, *Fitch Gilbert*, had been vice-president until February, 1892, and thereafter had been president, but not the detail managing officer. About the

1st of February, 1893, the corporation being then indebted to the plaintiff's firm more than $20,000, and having placed with that firm considerable further orders for the manufacture of castings and the like, the plaintiff claims that her husband, N. Shaw, who was an active participant in the business of N. Shaw & Co., called on the defendant, *Gilbert*, at the office of the company, and demanded of him a statement as to the true condition of its affairs, and, according to the complaint, stated as a reason therefor the size of the indebtedness and peril of ruin to the plaintiff's firm in case of trouble, and because, if anything was wrong, she desired to take measures to collect or secure said debt. Whereupon defendant, as alleged in the complaint, "in answer to said inquiry, and for the purpose of inducing the said N. Shaw & Co. to refrain from attempting to collect said indebtedness, and for the purpose of procuring from the said N. Shaw & Co. a larger credit for the said National Electric Manufacturing Company," made certain false, fraudulent, and deceitful statements, to wit, as testified by Noah Shaw, "that the National Electric Company was perfectly solvent; that their assets were largely in excess of their liabilities; that they had many bonds, notes, contracts, and book accounts, which all belonged to the company and were unincumbered; and that my fears were entirely groundless, and that I might furnish the National Electric Company, fill all orders of the National Electric Company, and extend notes as required by them, with perfect safety;" and that "they were doing a profitable business." Thereupon the plaintiff, relying on such statements and believing them to be true, continued to manufacture and furnish goods for the company, and did also extend the time of payment of the indebtedness theretofore existing. On or about April 29th, Noah Shaw testifies, a further interview was had, in which all of the foregoing statements were repeated verbatim, with the additional one that "we are so well satisfied with our business

that we have increased our capital stock to $500,000, all of which will be paid in full, and we shall then pay cash." Relying upon these statements, plaintiff's firm continued to supply and extend up to May 23, 1893, when the National Company made a voluntary assignment for the benefit of creditors. Between these two conversations goods were supplied of the price of $10,192.50, and between the second conversation and the assignment a further amount of $4,655.14, no part of which had been paid. Meanwhile $12,000 had been paid by the company, but was applied upon the pre-existing indebtedness. On the 25th of May, 1893, the plaintiff bought and received transfer of all Hopper's interest in the firm and its assets for full value, as she alleges. This, of course, included his share of the claim against the National Company for goods sold to it. Hopper died August 1, 1895, before the commencement of this action.

As a result of the trial, the jury found that the defendant did represent to N. Shaw & Co., both about February 1st and about April 29th, that the National Company "were perfectly solvent, that their assets were largely in excess of their liabilities, that they had many bonds, notes, contracts, and book accounts, which all belonged to the company, that the assets were unincumbered, and that the said company was doing a profitable business;" that all of said representations were false; that they were all made by the defendant as affirmations of existing facts, and were so understood by N. Shaw & Co.; that they were all made by the defendant, knowing them to be false, and that defendant then had the means of knowing them to be false; that they were made positively and as of defendant's own knowledge, with the intention of deceiving N. Shaw & Co.; that N. Shaw & Co. were, at the time they were made, ignorant of the falsity of such representations; that they did not have the means of knowing them to be false; that the representa-

tions were made by the defendant for the purpose of inducing N. Shaw & Co. to extend credit (supply goods) to the National Company; that N. Shaw & Co. believed the representations to be true, relied upon them, and were thereby induced to extend additional credit (furnish goods) to the National Company; that they exercised reasonable care and diligence in ascertaining the truth of the representations, and in extending credit to the National Company as they did; that they extended credit (furnished goods) to the amounts above stated, and that N. Shaw & Co. would not have extended such credit if such false representations had not been made; that the value of plaintiff's account against the Electric Manufacturing Company for the materials and labor furnished after February 1, 1893, as above found, was nothing at the date of the assignment, May 23, 1893, and it had no value at any time subsequent.

Upon the coming in of this verdict, motions for new trial and for judgment notwithstanding the verdict were overruled, the court signing an order to that effect, and filing a written decision containing the statement: "Interest will be allowed under the doctrine of *Arpin v. Burch*, 68 Wis. 619. . . . Plaintiff's attorneys may prepare judgment in accordance with the above memorandum, and overruling the defendant's motion for judgment and for new trial." Thereupon the clerk entered judgment in plaintiff's favor for the aggregate of the two sums found by the verdict, together with interest thereon from May 23, 1893, from which judgment defendant appeals.

For the appellant there were briefs by *Frawley, Bundy & Wilcox*, attorneys, and *Losey, Woodward & Lees*, of counsel, and oral argument by *C. T. Bundy* and *G. M. Woodward*. They contended, *inter alia*, that the measure of damages in this case is the difference between the actual value of the goods plaintiff sold, *at the time of the sale*, and the actual value of each month's current account, *at the time*

the same became due, with interest on such difference in the discretion of the jury. 14 Am. & Eng. Ency. of Law (2d ed.), 188; Sutherland, Damages (2d ed.), § 1171; *Peek v. Derry*, 37 Ch. Div. 541; 21 Am. & Eng. Corp. Cas. 243; *Baker v. Ashe*, 80 Tex. 356; *Van Epps v. Harrison*, 5 Hill, 62; *May v. Dyer*, 57 Ark. 441; *Hubbard v. Briggs*, 31 N. Y. 518; *Hubbell v. Meigs*, 50 N. Y. 480; *Vail v. Reynolds*, 118 N. Y. 297; *Townsend v. Felthousen*, 156 N. Y. 618; *Nash v. Minnesota T. I. & T. Co.* 163 Mass. 574; *Smith v. Bolles*, 132 U. S. 125; *Redding v. Godwin*, 44 Minn. 355; *Reynolds v. Franklin*, 47 Minn. 145; *Wallace v. Hollowell*, 56 Minn. 501; *American Nat. Bank v. Hammond*, 25 Colo. 367; *Whiting v. Price*, 172 Mass. 240; *Emmerson v. Dardanelle Bank*, 52 S. W. Rep. 274; *High v. Berret*, 148 Pa. St. 261; *Rockefeller v. Merritt*, 35 L. R. A. 639; *Birdsey v. Butterfield*, 34 Wis. 52; *Foster v. Taggart*, 54 Wis. 391; *Warner v. Benjamin*, 89 Wis. 290; *John V. Farwell Co. v. Wolf*, 96 Wis. 10; *Pieratt v. Young*, 49 S. W. Rep. 964; *Potter v. Necedah L. Co.* 105 Wis. 25. Depreciation of property which one has been induced to acquire by means of fraudulent representations cannot be taken into consideration as an element of damage. 14 Am. & Eng. Ency. of Law (2d ed.), 189; *Redding v. Godwin*, 44 Minn. 355; *Hubbell v. Meigs*, 50 N. Y. 481; *Brisbane v. Pomeroy*, 13 Daly, 358; *Marvin v. Prentice*, 94 N. Y. 295. The materiality of the alleged representations was for the jury. 14 Am. & Eng. Ency. of Law (2d ed.), 207; *Westbury v. Aberdein*, 2 Mees. & W. 267; *Lindenau v. Desborough*, 15 Eng. C. L. 306; *Phenix Ins. Co. v. Fulton*, 80 Ga. 224; *Sharp v. Ponce*, 74 Me. 470; *McAleer v. Horsey*, 35 Md. 439; *Moore v. Cains*, 116 Mass. 396; *Davis v. Davis*, 97 Mich. 419; *Bidault v. Wales*, 20 Mo. 546, 64 Am. Dec. 205; *Keller v. Niagara F. Ins. Co.* 16 Wis. 523. In cases of this character interest is a proper element of damage *in the discretion of the jury*, but the court must not award it. 3 Sutherland, Damages (2d ed.), § 1171; *Walrath v. Redfield*, 18 N. Y.

457; *Lincoln v. Claflin*, 7 Wall. 135; *Eddy v. Lafayette*, 49 Fed. Rep. 813; *Glaspell v. N. P. R. Co.* 43 Fed. Rep. 900; *Hallum v. Dickinson*, 47 Ark. 120; *Hinckley v. Beckwith*, 13 Wis. 37.

For the respondent there was a brief by *F. M. Miner*, attorney, and *Olin & Butler*, of counsel, and oral argument by *Mr. Miner*, *Mr. J. M. Olin*, and *Mr. H. L. Butler*. They argued, among other things, that, as tending to show insolvency in the sense of insufficiency of assets to pay liabilities, as well as to show the unprofitable character of the business, evidence was proper that the company had difficulty in meeting its obligations as they matured, that its bills were constantly discounted, that its assets were hypothecated as fast as acquired, that the company had no credit of its own, that its stock was unsalable, and other evidence of like character. Abbott, Trial Ev. (2d ed.), 777, § 5; *Jeffris v. Fitchburg R. Co.* 93 Wis. 250; *Rowe v. Leuthold*, 101 Wis. 242; *Clarke v. Mott*, 33 Pac. Rep. 884; *Mensing v. Atchison*, 26 S. W. Rep. 509; *Baily v. Hornthal*, 154 N. Y. 648, 656; *Tuthill v. Skidmore*, 124 N. Y. 148, 153; *Brown v. Montgomery*, 20 N. Y. 287; *Booth v. Powers*, 56 N. Y. 22, 32; *Pacific P. T. C. Co. v. Fleischner*, 66 Fed. Rep. 899, 905; *Lowry B. Co. v. Empire L. Co.* 91 Ga. 624; *Millard's Appeal*, 62 Conn. 184; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Larkin v. Hapgood*, 56 Vt. 597. Plaintiff is entitled to the entire damages. Hopper's interest in the cause of action in favor of the firm against this defendant could not pass to plaintiff by the assignment made. The injury complained of was done to the firm. The cause of action was therefore a joint cause of action in favor of the firm. This is true notwithstanding the partnership was dissolved before Hopper's death. Whether the relation of partnership, strictly speaking, continued as to the cause of action after the dissolution, is immaterial. The right of action must still have been prosecuted jointly, and would still remain a

joint cause of action in favor of both. Where any cause of action, though sounding in tort, existed in favor of two or more jointly, so that they might join in its enforcement, it survived at the common law on the death of one to the others. A distinction was made between survival of a cause of action in favor of the *representative* of the *sole* owner thereof, and survival in favor of the *survivor* of a deceased co-owner. *Wright v. Eldred*, 2 D. Chipman, 37; *Haven v. Brown*, 7 Me. 421; *Boynton v. Rees*, 9 Pick. 528; *Rowe v. Shenandoah P. Co.* 42 W. Va. 551; *Bond v. Hilton*, 6 Jones, Law, 180; *Taylor v. Church*, 9 How. Pr. 190; *Bohm v. Dunphy*, 1 Mont. 333, 341; *Atlanta v. Dooly*, 74 Ga. 702, 708; *Tucker v. P. & W. R. Co.* 18 R. I. 322; *Scoble v. Tolye*, Style, 102; *Spring v. Barret*, 2 Bulst. 262; *Farr v. Trustees A. O. U. W.* 83 Wis. 446; Freeman, Cotenancy, § 362; Dicey, Parties (2d Am. ed.), 402; 14 Viner, Abr. 473. The proposition that plaintiff was properly allowed the entire damage is, moreover, sustained by the rules which govern the relation of partners. The cause of action accrued to the partnership. When the dissolution occurred, there still remained outstanding firm liabilities to a large amount, due to the bank, and such liabilities are still unpaid. The parties remained partners in the cause of action, notwithstanding the dissolution, until the death of Hopper, when the legal title to the entire cause of action vested in plaintiff as his survivor. 1 Bates, Partnership, § 684; Dicey, Parties (2d Am. ed.), 386; *Shields v. Fuller*, 4 Wis. 102; *Yale v. Eames*, 1 Met. 486; *Murray v. Mumford*, 6 Cow. 441; *Shale v. Schantz*, 35 Hun, 622.

The following opinion was filed May 21, 1901:

DODGE, J. The appellant's brief presents and argues some seventy specific allegations of error. In many cases they are merely variant aspects of the same question, and in the effort to avoid undue prolixity we shall attempt to

discuss the questions raised, rather than the individual assignments.

1. An objection in the nature of a demurrer *ore tenus* was overruled. In this we find no error; for, while by the complaint were demanded elements of damage not recoverable, some cause of action was set forth. It was, at least, alleged that plaintiff and another, since deceased, parted with valuable property in ignorant reliance upon false statements of the defendant, known by him to be false, and intended to induce plaintiff to so part with her property. This was sufficient to sustain a cause of action.

2. The next subject for consideration arises upon some six or seven assignments of error raising the questions whether a certain class of evidence either tended or sufficed to establish insolvency of the National Electric Company at the times of the alleged misrepresentations. This evidence consisted of a vast array of transactions and correspondence indicating extreme pecuniary stringency and distress, defaults in payments when due, solicitation of extensions, overdrawn bank account, hypothecation of manufacturing contracts even before the machines had approached completion, and a multitude of other circumstances and instances extending through more than a year prior to the misrepresentations. No direct evidence was introduced showing the amount of either the assets or the debts of the company. The appellant correctly contends that none of these circumstances nor all of them constitute insolvency, but that, to show falsity of defendant's statement that the company was solvent, the fact must be made to appear that the assets, at a fair valuation, were not sufficient to satisfy its liabilities other than capital stock. *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352.

The respondent's counsel contends that, by the nature of things, he was cut off from presenting the best evidence, namely, the books and schedules of the corporation itself,

they not being competent against this defendant, and that evidence of its dealings was the next best. This position is hardly tenable. The question, "What assets and what liabilities had the corporation?" was capable of direct answer by the testimony of those who knew, such as the officers and employees. They, except defendant himself, were disinterested, and might have been called to the stand. Incompleteness of their memories from lapse of time might impair the strength of plaintiff's case, but the delay was her own and should not excuse her from proving her case by legal evidence or render admissible any other. We therefore must confront the question whether evidence of embarrassment, financial distress, and the like can generally be received as tending to prove the ultimate fact of insolvency in the sense above stated, i. e. preponderance of debts over assets fairly valued. Respondent cites numerous cases where such evidence is held both admissible and sufficient to prove insolvency, but in the great majority of those cases the term was used in a different sense, well recognized as its legal meaning in certain relations, to wit, as merely inability to meet debts as they mature in the ordinary course of business. *Jeffris v. Fitchburg R. Co.* 93 Wis. 250, is an illustration of this class. When that condition is all that need be proved, dishonor of commercial paper and like defaults not only tend to prove insolvency, they actually constitute acts of insolvency if unexplained.

Nevertheless, there is authority as well as reason in support of the view that extreme and unusual acts and conduct, such as are the customary accompaniments and consequence of insolvency in fact and are not usual accompaniments of a contrary condition, may be admitted to consideration as circumstances tending, in connection with other more direct evidence, to establish the fact that assets do not equal or exceed the debts. Abbott, Tr. Ev. (2d ed.), 777; *Jordan v. Osgood*, 109 Mass. 457; *Booth v. Powers*, 56 N. Y. 22, 32;

Mensing v. Atchison (Tex. Civ. App.), 26 S. W. Rep. 509. We conclude in favor of that rule, and accordingly hold that error is not well assigned upon the admission of this class of evidence, nor in permitting the jury to consider it upon the truth of the representation of solvency. There are perhaps items of evidence or testimony among those criticised by appellant which are not relevant upon that issue, but were relevant to the question of the extent of defendant's knowledge of the truth or falsity of that or the other representations charged against him, and of his knowledge of the usual course of business between plaintiff and the company, or by way of cross-examination of witnesses who had testified inconsistently with them. We do not deem it necessary to discuss the admissibility of each item of evidence, but merely pass upon it generically.

In this connection, it is natural to note appellant's contention that the evidence was not sufficient to sustain a finding of insolvency, as the term is above defined, merely to say, however, that we deem the question doubtful. Although the evidence of distress and the resort to extreme shifts and expedients for raising money may have been admissible, the conclusion of insolvency should be drawn therefrom, if at all, only with much hesitancy. Embarrassment, accompanied by extensions and other expedients, is not unusual with manufacturing concerns having abundant assets. Property is not money, and is not available to pay debts or wages, nor always as a basis of credit upon which to borrow. It must not be forgotten that a part of the period involved in the transaction was that preliminary to, and in part inclusive of, the now historical panic of 1893, when men and corporations of abundant wealth were driven to extraordinary shifts to raise trifling sums of money, when credit almost ceased, and rates of interest rose to fabulous height, so that conduct ordinarily inconsistent with solvency became insignificant on that subject. The evidence should,

in any event, be weighed with care and submitted to the jury with cautionary instructions to consider carefully all circumstances and explanations before drawing an inference of actual inadequacy of assets, at fair and ordinary values, to satisfy the debts of the National Company.

Appellant further asserts that the case was tried throughout and submitted to the jury on the assumption, by both attorneys and court, that solvency could not exist unless the assets, reasonably valued, exceeded all liabilities, inclusive of the par value of outstanding capital stock,—a proposition repudiated by this court in *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352, which had not been decided at the time of the trial below,—and that the answer of the jury finding the representation of solvency to be false is predicated upon that view. There are many things in the record not inconsistent with appellant's assertion. In the examination of witnesses by plaintiff's attorney, that construction of the word is repeatedly insisted on. Defendant's attorney had present in court, and referred to for certain purposes, a balance sheet of January 1, 1893, showing the assets to exceed debts by something like $180,000, but to be a trifle less than the total liabilities if outstanding stock were included, which, however, he refrained from introducing in evidence in such a way that it could be used upon the question of solvency. The instruction on the subject is consistent with either view. That instruction on the subject of insolvency was as follows: "A person is insolvent when his assets, at a fair market value, are not sufficient to pay his liabilities. You are instructed that the National Electric Manufacturing Company was not insolvent on the 1st day of February, 1893, or on the 20th day of April, 1893, if at such times its assets, at a fair market value, were worth more in the aggregate than its whole liabilities." Obviously the jury may have understood the words, "whole liabilities," to include or exclude capital

stock. Had an instruction making this phrase definite been requested and refused, we think it would have been error, but no such request was made. The instruction is not erroneous if the word "liabilities" is understood in its true and legal sense, as defined in *Hamilton v. Menominee Falls Q. Co.*, *supra*, and it may be that we cannot properly infer that it was either used by the court or understood by the jury in an erroneous sense. We shall not, therefore, predicate reversal upon any such error, but take this occasion to reassert the doctrine on this subject of *Hamilton v. Menominee Falls Q. Co.*, and to express the expectation that upon another trial the court's attitude will be without ambiguity, and the jury clearly instructed.

3. One William E. Smith, who was auditor of the National Company during the periods involved in this case, testified that shortly after February 1st he had an extended interview and conversation with Mr. Hopper, of the firm of N. Shaw & Co., in which he went fully into the affairs of the company, and exhibited to Mr. Hopper the balance sheet of resources and liabilities of date January 1, 1893, whereby it appeared that about $110,000 of the company's indebtedness was secured by collaterals, which, Smith explained, meant that accounts, bills receivable, and contracts had been pledged to stockholders for advances of that amount of money to the company. It also appeared by such balance sheet that the net losses of the company in 1891 and 1892 had been about $15,000, and that to such extent its resources were less than its liabilities, including capital stock. By accompanying inventory, also exhibited, it appeared that in those resources were included such items of doubtful sale value as patterns, over $7,000; advertising matter, $1,700; patent account, over $10,000; and experiment and exploitation account, over $10,000. Smith also testified that the examination was not cursory, but item by item, and with explanation by him of the facts. Hopper being dead, there

was no direct contradiction of this testimony, though plaintiff claimed that it was antagonized by many considerations of improbability. Appellant contends that from this conversation it conclusively appears that N. Shaw & Co. were fully informed of the facts as to the solvency or otherwise of the National Company, as to the fact that its available credit assets were in large degree hypothecated, and as to the true extent to which business was profitable, and that thereafter the plaintiff's firm could not, in the exercise of reasonable care, as matter of law, rely upon any statements to the contrary which had been made by the defendant. Appellant requested direction of a verdict on this ground; also the submission of a question whether N. Shaw & Co. received the information so testified to; also whether such information was sufficient to set a prudent man on inquiry; and as to what amount of goods were sold between the representations by *Gilbert* and the conversation with Smith. He also asked instruction that the jury should consider Smith's testimony in determining on due diligence, and that such information, if given, terminated any right to rely on the defendant's representations. He excepted to the instructions in fact given, because they permitted the jury to find Shaw & Co. to have been ignorant and to have exercised reasonable diligence, although Smith's undisputed testimony showed the contrary; and he also moved for a new trial because this testimony negatived, without dispute, any possibility of reasonable diligence on the part of plaintiff's firm.

Without assuming to decide, adversely to the view of the trial court, that Smith's testimony was so without conflict, either of testimony or of probabilities, that the court ought to have proceeded upon the assumption that the interview testified to by him took place and that all the information described by him was in fact disclosed, it appears to us entirely clear that not enough significance was given to that testimony in the submission of the case. If Noah Shaw

& Co. did receive this information within a few days after *Gilbert's* representations to them, they certainly had no further right to rely blindly on statements in conflict therewith. That they did continue to rely without further investigations is distinctly testified to by Mr. Shaw. The court went no further than to submit to the jury the question whether the plaintiff's firm exercised due care and diligence in ascertaining the truth of *Gilbert's* statements and in extending credit, and to instruct them, in substance, that by reasonable care and diligence is meant the care which ordinarily prudent men would exercise under the same circumstances; that, if they knew the representations were false, they had no right to rely upon them nor extend credit; and if they had notice of actual facts, concerning which representations were made, or had knowledge of facts which, by use of reasonable diligence, would have led to the discovery of the truth of the representations, and failed to use such diligence, they must answer, "No;" and that they were to take into consideration all the facts and circumstances proven bearing upon the same, and all the knowledge, from whatever source it came, that was brought home, either to Noah Shaw or George W. Hopper, bearing upon the truth or falsity of any of the representations. The question of fact whether Smith gave the information, as he testifies, should have been specifically submitted to the jury in some way, either by direct question or by instruction that, if he did, the plaintiff could not be held to have exercised reasonable care in continuing to rely on *Gilbert's* representations in conflict therewith. No equivalent for such submission or instruction can be found in the charge. Under the rule of *Warner v. Benjamin*, 89 Wis. 290, 295, error was thus committed clearly prejudicial to defendant, from which reversal must result.

4. We are in some doubt whether the most fundamental question of all, namely, the making of any representations

whatever, was not so confused by the manner of its submission that the jury did not squarely pass upon it. The dispute in the evidence was not whether certain things were said in the two alleged conversations between Noah Shaw and *Gilbert*, but whether any conversations were in fact had. Noah Shaw testified that they were; *Gilbert* testified, with equal positiveness, that they were not, and was supported inferentially by men in the company's office, who denied ever seeing Shaw there at or near the times specified by him. As to what was said if the interviews occurred, Shaw's testimony stood alone and uncontradicted, except by what appellant urges as inherent probability. The trial court submitted the issue by the first and twenty-sixth questions: "Did the defendant at the time of the first [and second] conversation represent to N. Shaw & Co. that," etc.? True, the court instructed the jury: "We have spoken of certain conversations as the first and second conversations. We have done that for the sake of brevity. When we say 'first conversation,'— when I instruct you or read from the questions in regard to the first conversation,—I refer to that conversation, if any was held, which plaintiff [*sic*] testified that he had with the defendant about the first of February, 1893." This is confusing. It falls far short of fastening the minds of the jury upon the square issue of fact to be decided, and hardly suffices to overcome the vice of the question itself, which relates to the matter of a conversation, and not to its occurrence. The minds of the jury are not turned from consideration of what was said as the important thing to consideration of whether the interview took place. We cannot, perhaps, say either that the question was strictly erroneous, or that the jury have not, by answering it, found as a fact that a conversation was had, as well as that certain things were there said. Our conclusion upon the whole case renders it not necessary to decide whether reversible error was thus committed, and we may pass the subject with the

foregoing expression of doubt, and with the expectation that upon another trial the real issue will be clearly submitted.

In this connection it is perhaps most natural to say that we cannot concur in the view advanced by appellant, under other assignments of error, that the evidence was not sufficient to support a finding that the representations complained of were made. Noah Shaw testified thereto positively, and *Gilbert*, with equal positiveness, made denial. This, we think, makes a jury issue, notwithstanding certain circumstances which, appellant argues, render Shaw's testimony incredible. Such evidence consists of the testimony of employees of the National Company that they never saw him enter the office, and of his own testimony that he never at any other time had any transactions on behalf of Shaw & Co. with the National Company or with *Gilbert*. This evidence, however, goes no further than to create a conflict and present a question, the jury's answer to which, either way, has support.

5. Another assignment of error is predicated upon a contention that certain questions were duplex or compound. Of these, question 21 is typical. That question, referring to questions 1, 2, 3, and 4, whereby it was found that three representations were made, all of which were false, inquired, "Did N. Shaw & Co. rely upon such representations so found by you to have been falsely made, and were they induced thereby to extend additional credit to the National Electric Manufacturing Company?" That question was answered in the affirmative. No prejudicial duplicity exists in this question, in view of the answer thereto. Appellant's argument seems to be based upon the understanding that the inclusion in a question of the special verdict of several inquiries, capable of answer in different ways, is necessarily erroneous and prejudicial. This is not true. Such question is materially erroneous only when, measured by its answer, it leaves the decision of the jury ambiguous and uncertain.

If a jury be asked whether three separate propositions be true, all joined by the conjunctive, and answer in the affirmative, there is no uncertainty or ambiguity as to any one of them. By declaring that all are true, they have declared that each is. The same question, answered in the negative, might constitute reversible error, if more than one proposition submitted were material; for then the jury, by answering in the negative to the inquiry whether all are true, have not necessarily declared their decision as to any one of them. Such was the vice fatal in *Dugal v. Chippewa Falls*, 101 Wis. 533. That vice, if it existed in the question now under consideration, was cured by the affirmative answer, unambiguously declaring that the plaintiff did rely upon the representations found to be false, and also did extend credit by reason thereof.

Still another consideration disposes of this assignment of error, namely, that the answer to this question is equally sufficient to support a judgment whether the reliance were placed on one or on all of the false misrepresentations, since, as hereafter pointed out, they are each and all material. Such was the ground of overruling a similar assignment in *Patry v. C., St. P., M. & O. R. Co.* 82 Wis. 408, where the question was whether either conductor or brakeman of a defendant railway company invited plaintiff upon the train. It was wholly unnecessary that the jury should define which, for the invitation by either was sufficient to establish the liability.

6. Another class of the assignments of error are predicated on the contention that the three representations included in the special verdict were not the only ones made, but that in the first conversation it was represented that the plaintiff would be safe in filling future orders, and in the second conversation that the stock of the company would be increased to $500,000, and that it would thereafter pay cash for everything. The argument is that these rep-

resentations were not actionable, and that if plaintiff relied thereon her action cannot be maintained. The court refused to inquire whether plaintiff did rely on these statements or would have sold without them. Noah Shaw testified that he relied on all the representations made to him. The jury have found, in reply to another question, that the plaintiff's firm did rely on the representations specified in the first question, and found to be false. This is, of course, sufficient. A false statement relied on, and without which the transaction would not have been had, constitutes legal deceit, although it may not have been the sole and only motive or consideration moving the defrauded party thereto. Doubtless, if it had appeared that plaintiff relied solely on the assertion of the defendant's opinion that she would be entirely safe in filling future orders, she could not maintain a recovery although other false statements had been made, upon which she did not rely; but the jury have negatived any such contention. The submission of the question whether she also relied on other unactionable statements or assertions would have been wholly immaterial. 14 Am. & Eng. Ency. of Law (2d ed.), 61, note 5; *Safford v. Grout*, 120 Mass. 20; *McAleer v. Horsey*, 35 Md. 439, 453; *James v. Hodsden*, 47 Vt. 127, 137; *Warner v. Benjamin*, 89 Wis. 290.

7. Appellant requested submission of question whether the representations assigned were made for the purpose of assuring plaintiff that the then existing indebtedness due from the National Company would be paid, and the court refused. The question in fact submitted was whether the representations were made by the defendant for the purpose of inducing N. Shaw & Co. to extend credit to the National Company, and the jury were instructed, in effect, that the words "extend credit" meant to furnish additional materials and perform additional work. This they answered in the affirmative, after being instructed that they could not so answer if defendant's *only* purpose was to as-

sure plaintiff that the then existing indebtedness would be paid. In this respect we are satisfied no error was committed. It would be immaterial that defendant might have intended to assure plaintiff of the safety of her existing indebtedness, if he also intended to induce further extension of credit. That he did intend the latter, and that the former was not his sole purpose, has been distinctly found by the jury, under apt and proper instructions.

8. Another of the assignments of error, closely connected with the foregoing, is the refusal to instruct the jury that there was no evidence upon which they could find that the representations were made for the purpose of inducing the subsequent furnishing of materials or work for the National Company. The evidence of the plaintiff with reference to that conversation, as well as the evidence of the situation generally, shows that both parties had in expectation that plaintiff was to continue furnishing castings for the National Company, and one of the assertions claimed to have been made by the defendant was that plaintiff might "fill all orders of the National Electric Company, and extend notes as required by them, with perfect safety." This certainly was sufficient to carry to the jury the question of defendant's intent to influence plaintiff's conduct in respect to future transactions.

9. Another series of assignments of error are based upon the contention, first, that the jury nowhere found that any of the misrepresentations were material, although they did find that they were intended to be relied on and were relied on. It is also insisted that, if the representation of solvency were in fact true, the representations that the business was profitable, and that the assets were unincumbered, were, as matter of law, immaterial, and the jury should have been so instructed and directed to so find. We do not consider any of these assignments of error well taken; for it seems apparent that all of the three principal representations — solv-

ency, large amount and unincumbered condition of assets, and profitable condition of business — were material as matter of law. Solvency is substantially conceded by appellant's counsel to be so material, but solvency, as already defined, is not inconsistent with failure to pay indebtedness at the time it is due, nor even with inability to enforce payment at any time. Though solvent, in the sense that at the time under consideration a debtor's assets, at fair value, exceed the amount of his liabilities, it is by no means impossible that there may be such pecuniary stringency as to make payment inconvenient, if not well-nigh impossible, at the time the debt falls due; or that the property may have been pledged as security, so that in the enforcement of the debts for which it is pledged the margin of excess may be wasted and destroyed, certainly so that it cannot be made available in money to meet other debts. In considering the safety of extending credit to one in active manufacturing or mercantile business, few circumstances are of equal cogency with that of the existence of large amounts of available assets, such as can be readily reduced to money, made the basis on which to borrow, or may even be acceptable to the creditor in payment. Most notable among these are good accounts and bills receivable. If these be in hand in large amount, a prospective dealer may well take the chances of securing payment of his claim as against other creditors, by reason of his willingness to accept certain of those assets in payment, or by reason of his belief that he can readily find an investor willing to loan enough money upon such security to enable his debtor to satisfy him.

Hardly less material to the quality of a contemplated line of credit is the fact that the debtor's business is prosperous. Solvency in an unprofitable business may quickly become insolvency by the very necessity of realizing upon assets to meet pressing debts. But if the business is profitable the probabilities of such a contingency are greatly lessened. A

careful credit man may justly consider that the solvency of his debtor is then increasing instead of likely to decrease. While materiality of the facts represented is essential to maintenance of an action of deceit (*McAleer v. Horsey*, 35 Md. 439), yet such materiality may be so plain that the court should decide it as matter of law, as we have recently declared in *McGowan v. Supreme Court I. O. F.* 107 Wis. 462.

10. The appellant requested the court to submit to the jury, both by a separate question and by instruction, the proposition that a slight want of ordinary care was inconsistent with the reasonable diligence necessary to a recovery in reliance upon the statements claimed to have been made by the defendant. It is unnecessary at this time to review the considerations which have led this court to hold that, since any want of ordinary care constitutes negligence, a party is entitled to have submitted to the jury, either by question or by express instruction, whether there has been even a slight want of ordinary care. The rule requiring such submission may be thought to smack of overrefinement, but it has been adopted and adhered to so fully that its propriety is now beyond discussion. *Jung v. Stevens Point*, 74 Wis. 547. The plaintiff in this case owed the duty of all the care and diligence which would ordinarily be exercised by an ordinarily diligent and prudent person under like circumstances. If at any stage of the transactions she was guilty of any omission of such diligence or care, however slight, she would not be entitled to recover damages thereby caused. The rule, having been requested so as to fully call the court's attention to it, should have been either given or submitted to the jury, and refusal thereof was error.

11. Appellant requested instruction: "(14) You are instructed that you cannot find that the defendant falsely or fraudulently made representations to N. Shaw & Co. from conjecture or mere inference. Fraud must be clearly proven, and the burden of proof is on the plaintiff to establish that

fact." We think this instruction, or an equivalent, should have been given, and that its refusal is distinct and reversible error. The rule is general and elementary that while fraud, and especially the intent, may be inferred from acts, conduct, and circumstances, yet, as the assertion of fraud involves a charge of moral turpitude, such inference is not to be lightly drawn from doubtful and ambiguous circumstances, nor because of mere suspicion or conjecture. The field of inference is a dangerous one, because the most innocent circumstances can, by juxtaposition with others as presented by counsel, often be colored with suspicion, which, aided by sympathy for the suffering victim of alleged deceit, may often hurry the jury across the line between mere conjecture and legitimate inference, unless restrained by cautionary instructions to sane and careful watchfulness over their mental steps. Juries should always be instructed that they cannot draw an inference of fraud except upon *clear and satisfactory* evidence legitimately pointing thereto. 1 Jones, Ev. § 190.

12. An error is assigned to remarks of counsel and the court thereon, which, while not very definite, seem to include an erroneous idea to which it may be well to call attention. Plaintiff's counsel was commenting upon a voluminous array of letters written by the defendant, claimed by the plaintiff's attorney to constitute evidence, by way of admissions, at once of the insolvency of the company and of *Mr. Gilbert's* knowledge of the fact. He thereupon made the assertion that, if there was any letter there that was favorable to *Mr. Gilbert*, defendant would have put it in. This was objected to, and the court asked to rule that it was improper and that defendant could not, as matter of law, put in a letter that was written by him to somebody else; to which the court ruled: "I am inclined to think that as the matter stands before the court, that other letters in his favor would have been admissible." No rule of law

is more elementary than that a party cannot offer in evidence his own self-serving declarations or statements. This ruling would certainly tend to convey to the jury the contrary idea, namely, that if *Mr. Gilbert* had ever written a letter, either denying the company's insolvency or denying his own knowledge thereof, it would have been received in evidence; hence that he never had written such a letter. If this is its fair meaning, it was erroneous and prejudicial.

13. Appellant assigns three separate errors, the substance of which is a complaint that the court allowed the jury to find, and adopt as the measure of plaintiff's damage, the price of the goods sold to the company subsequent to the two representations, in which price there was a margin of profit to the plaintiff of from five to ten per cent. In this there was no error. Plaintiff was entitled to recover as damages the value of the goods parted with on the faith of the misrepresentations, and the evidence is undisputed that the price at which they were sold was the fair value. The fact that in this value was an ordinary measure of trade profit does not interfere with the application of the above rule, any more than as if one purchased by fraud from an ordinary retail dealer the goods upon his shelves at the price at which they were customarily sold in the community. *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 20.

14. Two of the most strenuously argued assignments of error are predicated upon refusal of the court either to decide in defendant's favor or to submit to the jury the question of the value, prior to the company's failure, of the accounts owing by the National Company to plaintiff's firm for goods sold after February 1, 1893, or of the three notes received for such accounts at the end of February, March, or April. We are unable to perceive any error in refusing the specific requests made. The value neither of the open accounts at the end of each month, nor of the notes given in settlement thereof, was of any materiality, so long as

plaintiff had no opportunity to realize thereon in accordance with the course of business contemplated by plaintiff and defendant at the time of the misrepresentations. In the purchase of some commodity, either to be consumed or to be resold, it may well be that the safest measure of damage to the defrauded purchaser is the difference between the actual money value of the commodity at the time of its receipt and its value if as represented. Such rule has been applied in a multitude of cases relating to a variety of commodities, including stocks and perhaps bonds, where of a merchantable character, so that a sale, instead of collection, would be the ordinary process of realizing on them. In case of commodities presumably purchased for resale, the subsequent rise or fall is at the risk of the purchaser, and does not enter into consideration of his damages, except under peculiar circumstances. A few of the many illustrations of the foregoing rules of damage may be cited: *Birdsey v. Butterfield*, 34 Wis. 52; *Warner v. Benjamin*, 89 Wis. 290, 295; *Krause v. Busacker*, 105 Wis. 350, 355; Sutherland, Damages (2d ed.), § 1171; *Vail v. Reynolds*, 118 N. Y. 297; *Smith v. Bolles*, 132 U. S. 125. Obviously, however, where the result of deceit is to foist upon a party a claim for a sum of money, the same principles must be applied in a different manner in order to correctly measure the damage. If he ultimately receives the full amount of his claim, he suffers no damage and can recover none, although that results from subsequent appreciation of security or subsequently attained solvency of the debtor. *Foster v. Taggart*, 54 Wis. 391; *Potter v. Necedah L. Co.* 105 Wis. 25. The worthlessness of the claim at the time of its acquisition would not fix the measure of a defendant's liability, and the converse ought not to, unless ultimate failure of collection results from negligence or from conduct not fairly within the contemplation of the parties or the ordinary and natural course of events. *Baker*

v. Ashe, 80 Tex. 356; *James v. Hodsden*, 47 Vt. 128, 138; *Coffing v. Dodge*, 167 Mass. 231; *Smith v. Duffy*, 57 N. J. Law, 679. The situation disclosed at the time of the misrepresentations wholly negatived the idea that plaintiff was to do otherwise than seek collection according to their established custom of dealing, whether of the account at the end of each month, or of any note received in extension thereof, such extension having been customary. It was not contemplated that she was to expose upon the market for sale, at such price as she could obtain, either such accounts or notes. Such conduct would very quickly transpose embarrassment of the company into insolvency and failure. The value of accounts or notes is of no materiality prior to the time when, according to the contemplation of the parties, the plaintiff would be expected to demand and insist upon payment. This time did not occur at the end of each month; for settlement and extension by note of the monthly account was the custom. No evidence exists whether any of the notes taken were for longer time than the previous course of business warranted, and no proof is made of any unusual conduct in the way of extending or renewing such notes, or omission of any efforts to collect when due which defendant had a right to expect. Without such showing no error was committed in refusing to submit the question demanded.

15. An error seems to us well assigned in connection with the recognition as an asset of the liability of certain stockholders for the face of some $48,000 of so-called "dividend stock" issued without anything paid therefor. It was shown with substantial conclusiveness that the other assets had at least sufficed to discharge the expenses of settling the estate of the company; that some $42,000 of this stock was issued to, and held by, responsible holders; and that plaintiff's claim constituted about one fifteenth of the total debts, so that her share of the $42,000 would approximate $2,600.

Plaintiff's attorney, in argument, substantially consented that the jury estimate her probable recovery out of this asset at ten per cent. of her claim. The court instructed the jury, in substance, that this liability was established and plaintiff's right to share therein conceded. Notwithstanding all this, the jury found that the value of plaintiff's account against the company was *nil*. It is difficult to discover how such finding could stand in the light of the evidence or of the instruction. We think the court should have either set it aside or required remission of a sum commensurate to plaintiff's share of this asset.

Another error associated with that just discussed consisted in refusal of an instruction that the amount of this asset was not merely the face of the stock issued without consideration, but also interest thereon from date of its issue. If the stockholders were liable at all, they were liable as well for interest from the time when they ought to have paid the principal. *Laycock v. Parker*, 103 Wis. 161, 187. That time was, of course, when they received the unlawfully issued stock. *Jenkins v. Bradley*, 104 Wis. 540, 563. The interest from that time would have been so considerable a sum that the share apportionable to plaintiff's claim against the company would have approximated a thousand dollars. Instruction should have been given substantially as requested.

16. Specific error is assigned upon the refusal of the court to restrict plaintiff's recovery to five sixths of the damage caused to herself and Hopper, her partner, jointly by the alleged deceit. Upon the exact question raised, counsel cite no direct authority to guide us. Plaintiff claims recovery of the whole as survivor of two joint sufferers by a tort,— a right well recognized, and of which we should not doubt if there had existed any joint right of recovery up to the time of Hopper's death. But did any such right of action remain in him after the sale to plaintiff of his interest

in the debt due from the National Company? That was not, in terms, even an attempt to assign the unassignable tort cause of action. *John V. Farwell Co. v. Wolf*, 96 Wis. 10; *Lane v. Frawley*, 102 Wis. 373. So that we have not the question whether an attempted assignment of a nonassignable claim leaves any cause of action in the assignor. The question is very different. It is, in effect, whether, when one who has been defrauded into buying a credit, afterwards sells that credit for all it would have been worth if the false representations had been true, he has still a cause of action for deceit. The question would seem to answer itself. Deceit alone gives no right of action unless damage is suffered. *Potter v. Necedah L. Co.* 105 Wis. 25. As we have pointed out under No. 14, the difference in market value is not the measure of damage in the acquisition of debts. *Foster v. Taggart*, 54 Wis. 391. Surely, if a deceitfully sold promissory note was in fact paid by its maker, no cause of action in tort would exist, however valueless the note might have been. Why should its purchaser any more have a cause of action for damages if he had sold the note for its face value without recourse on himself? He would no more suffer damage in the latter case than in the former. The principle is suggested in *Barth v. Loeffelholtz*, 108 Wis. 562. There it was pointed out that one who had been defrauded into becoming a creditor had two entirely consistent causes of action, and might pursue either or both; that he might sue *ex contractu* and have judgment on his debt, and afterwards sue in tort and have another judgment for his damages *provided he had not obtained satisfaction;* that one satisfaction would discharge both rights of action. That would seem to be the situation here; for Hopper in his lifetime had received, according to the evidence, full value for his share of this claim against the National Company. After that he had no right of action either on the debt or for

damages, and plaintiff might have sued alone for her own injury. That one of several joint sufferers by a tort may receive satisfaction of his share of the damage, and that thereupon the others may sue without him, but can recover only their own shares, is sustained by the highest of English authority. *Sedgworth v. Overend*, 7 Term, 279; *Bloxam v. Hubbard*, 5 East, 407. Approved in America in *Hart v. Fitzgerald*, 2 Mass. 509, 511; *Sherman v. Fall River I. W. Co.* 5 Allen, 213, 215; *Smith v. Aldrich*, 12 Allen, 553, 556; *Call v. Buttrick*, 4 Cush. 345, 350; *Lewis v. Lyman*, 22 Pick. 437, 444. It seems obvious that at the time of Hopper's death there existed no joint right of action in tort, and that plaintiff can now recover only her separate interest in the damage caused by defendant's deceit. Error was therefore committed in allowing recovery to the full value of the credit given, instead of only for five sixths thereof.

17. The judgment is further vigorously assailed as not supported by the verdict nor by any order of court, it having been entered by the clerk upon the filing of an order merely denying defendant's motion to set the verdict aside and for judgment. The order of the court in that connection is somewhat ambiguous, and perhaps did not warrant the clerk in entering the judgment. If, however, the judgment was warranted by the verdict, as the court apparently decided, no prejudicial error would result. We need not, however, discuss that question, since we have found reversal inevitable on other grounds. The situation, of course, will not repeat itself upon another trial.

In the same connection, however, is raised one question upon which we ought to speak; that is, the award of interest by the court without any finding of the jury other than the amount to which the plaintiff's firm was induced to give credit by the defendant's misrepresentations. The appellant contends that in all actions for recovery of unliquidated damages interest can only be recovered as damages and in

the discretion of the jury. The books contain many statements generally to this effect. The greater the antiquity the more general is that view, until we reach an age when interest as such received no recognition from the courts. It was, at most, permitted to juries as a method of punishment of a wrongdoer. In modern times interest has come to be recognized as a legal right enjoyed by a claimant, not merely as a mulct imposed on a defendant. *Laycock v. Parker*, 103 Wis. 161, 179. Treatment of interest as damages, and in the discretion of the jury, is still maintained to some extent, more in England than in America. In the latter, that view is becoming more and more confined to classes of recovery where the whole subject of damages, as measured by money, rests in the discretion of the jury; such as for personal injuries, defamation, and the like, where, as it is said, the injury has no real money value. Perley, Interest, 194. In such cases the rule amounts to no more than that the lapse of time may, in the judgment of the jury, have increased the damages, and in estimating such increase they may use legal rates of interest as a basis. On the other hand is that class of cases where the damage is of a pecuniary character, measurable in money with reasonable certainty, as where the conduct of the defendant has deprived the plaintiff of money or of property of reasonably definite money value. In that class of cases the trend of modern decision is to the proposition that full compensation can be made only by requiring reimbursement of the money value and the interest such money would presumably have earned in the hands of the party deprived of it. Interest is allowed as damages, it is true, but as compensatory damages, measured according to a certain rule of law which courts are bound to apply and not to leave subject to the discretion of juries. With this modern attitude this court has placed itself in entire accord, after careful deliberation, in *J. I. Case P. Works v. Niles & Scott Co.* 107 Wis. 9. That decision was reached

after full consideration of the contrary authorities, including the somewhat hasty remarks in *Hinckley v. Beckwith*, 13 Wis. 31, 37, and *Allen v. Murray*, 87 Wis. 41, 48, and overrules them so far as there is conflict. In accord with the views so adopted, there can be no doubt that one defrauded of money or valuable property is entitled to recover not only such money or value, but also interest from the date of the deprivation, both of them as legal elements of his damage. *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 20. It follows that, when the necessary facts are ascertained, the court may and should apply the law. When the value of the property lost and the date are found by the jury, rendition of judgment, including the interest, follows as necessarily as for the value itself. In the record before us there is a lack of definiteness as to when plaintiff suffered her loss. That did not occur until the time arrived when, according to her contract with the National Company and in accord with the contemplated dealing, she was entitled to insist on payment. The same considerations which led us to overrule the assignments of error discussed as No. 14 indicate the necessity of more definite information as to when the actual deprivation of money was suffered by plaintiff. So far as appears, it may not have been until later than May 23, 1893.

We find no other questions raised which, by reason either of their general importance or their probable significance upon another trial, justify protracting this opinion by their discussion. Whether some other rulings on evidence or some refusals of requested instructions may have constituted technical error or may not is not very material, since for errors already defined we must reverse and order new trial. So far as such questions are not answered by the general views expressed they are deemed unnecessary of discussion.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CASSODAY, C. J. I concur in the reversal of the judgment in this case for errors mentioned in the opinion filed; but, assuming that the plaintiff has the right to recover, then I dissent from the proposition that the plaintiff, as surviving partner of the firm, cannot recover the full amount of damages sustained by the firm by reason of the tort committed by the defendant. In my judgment, the defendant is not relieved from such liability by reason of the fact that the plaintiff purchased the interest of her partner in the assets and business of the firm. This view is sustained, as I think, by the authorities cited by the plaintiff's counsel.

A motion by the appellant for a rehearing was submitted on the brief of *Frawley, Bundy & Wilcox*, attorneys, and *G. M. Woodward*, of counsel.

The motion was denied September 24, 1901.

LENZ, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 22—September 24, 1901.

Railroads: Condemnation of land: Res judicata: *Proceeding by land owner: "Assumption" of debt includes promise to pay: Practice: Definiteness in petition and findings.*

1. The decision in a condemnation proceeding instituted by one of several persons similarly situated and injured by the construction of a railroad in a street, is not conclusive, as *res judicata*, in a similar proceeding by another of such persons, but is authoritative under the rule of *stare decisis*.
2. Although sec. 1296*a*, Stats. 1898, giving to an abutting lotowner a right to compensation for injury from the construction of a railroad in the opposite side of the street, gives right of condemnation only to the railroad company, the lotowner may nevertheless institute condemnation proceedings under sec. 1852 where the company delays or omits to do so.

3. The "assumption" by the grantee, as part of the consideration for the conveyance of railroad property, of all the existing debts, liabilities, and obligations of the grantor company, includes a promise to discharge each debt or liability to the same person and in the same manner as the grantor was bound to do. Such promise evinces an intent to benefit the creditors, and they may sue directly thereon.

4. It having been for many years the settled law that an agreement, by the grantee in a conveyance, to assume a debt of the grantor confers a right of recovery upon the third party creditor against the grantee, it must be presumed that the parties to such an agreement intended that result.

5. Sec. 1846, Stats. 1898, being framed to regulate condemnation proceedings instituted by a railroad company, is not literally applicable to a proceeding instituted by a property owner under sec. 1852 to secure compensation for land already taken; and in such case the ordinary rule as to liberality in the construction of pleadings should apply.

6. In such a proceeding, however, the petition, findings, and judgment should be so definite as to leave no uncertainty as to the land affected or the rights of the company therein. In this case a certain lack of definiteness and specification, which might have been cured had proper objection been made, is *held* not so great, when the finding is construed in the light of the entire record, as to be prejudicial to the appellant company.

APPEAL from an order of the circuit court for Manitowoc county: GEO. CLEMENTSON, Judge. *Affirmed.*

This was a proceeding instituted by *Jacob Lenz* for condemnation, commenced at the same time, and in all respects similar to, that considered in *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, the petition being substantially the same, as also the findings of fact and the order of the circuit court appointing commissioners to fix the damages. In this case, however, amended answer was interposed, denying the allegation that the appellant, in 1893, assumed and agreed to pay the liability of its grantor, the Milwaukee, Lake Shore & Western Railway Company (hereafter called Lake Shore) to this petitioner. Certain of the findings are excepted to as not sustained by the evidence, which is brought into the record by bill of exceptions.

The facts as they appear are that in 1890 the Lake Shore, under authority of an ordinance of the city of Manitowoc, accompanied by a due map of location filed with the city clerk, constructed a track along the north half of Quay street in that city, opposite the lots of the petitioner, which were on the south side of the street; that petitioner had taken no steps to prevent such construction or recover compensation therefor. In 1893 the Lake Shore conveyed all of its railroad property to the *Chicago & Northwestern Railway Company* (hereafter called the *Northwestern*) by deed, which recited that the conveyance was in consideration of $100 "and the assumption by the party of the second part [grantee] of all the existing debts, liabilities, and obligations of said party of the first part." Thenceforward the *Northwestern* has owned and operated the track on said Quay street.

This proceeding was instituted May 21, 1897, at the time with some nineteen others, including that of Kuhl above mentioned; the attorneys for the several plaintiffs acting in association with each other. The appellant, after having demurred and answered, made objection upon the trial by moving to dismiss the proceeding on account of the insufficiency of the petition, and also an objection to any evidence in the nature of a demurrer *ore tenus*.

At the close of the trial the court found facts substantially as above stated, and also that by the deed above mentioned the *Northwestern* assumed, and promised and agreed to pay, all the then existing debts, liabilities, and obligations of the Lake Shore; that the location, maintenance, and operation of the railroad materially interfered with the usefulness of the street, and materially injured and damaged the property of the petitioner; and made an order reciting that the railroad company had laid down, maintained, and operated a railroad on the north half of Quay street, in front of and passing the premises of the petitioner, together with other

facts, and determining that a case for condemnation existed, and appointing commissioners,— from which this appeal is brought.

Edward M. Hyzer, for the appellant.

For the respondent there were separate briefs by *G. G. Sedgwick* and *O'Connor, Hammel & Schmitz*, and oral argument by *Mr. Sedgwick* and *Mr. A. J. Schmitz.*

The following opinion was filed June 20, 1901:

DODGE, J. The rights of parties similarly situated with those now before us were considered by this court in *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, which case, the respondent contends, is conclusive, as *res adjudicata*, upon the present. That contention, of course, cannot be sustained. The parties are not the same, and, as a decision in that proceeding would not have been conclusive against this petitioner, it cannot be conclusive in his favor. So far, however, as the questions now presented are the same as those considered and disposed of in that case, the decision of the court is authoritative, upon the rule of *stare decisis*, unless we must now determine to overrule it.

The first position argued by appellant is that an abutting lotowner upon the opposite side of the street has no right to institute condemnation proceedings in reliance upon sec. 1852, Stats. 1898, for the reason that sec. 1296*a*, Stats. 1898, giving to the lotowner right to compensation, gives right of condemnation only to the railroad company. This question was squarely presented by the briefs of the opposing parties and was fully decided in favor of the petitioner in the *Kuhl Case*, and we see no reason to hesitate in yielding to that decision full authority now. That objection to the present proceeding must, therefore, be overruled.

It was further decided in the *Kuhl Case* that, if the *Northwestern*, as a consideration for the transfer to it from the Lake Shore, assumed and promised and agreed to pay all

the debts and obligations of said Lake Shore, and all just claims against it,— as the court found in that case,— then it was liable upon that contract to the petitioner in a proceeding under sec. 1852, Stats. 1898, and that the statute of limitations upon such right of recovery commenced to run only upon the making of the deed containing such assumption of liabilities. Appellant now assails the holding that original liability could thus be created against the *Northwestern*. It also contends that the evidence which is now before us does not support the finding. The first of these contentions — that which assails the proposition of law decided in the *Kuhl Case* — we have no hesitation in overruling. We are entirely satisfied with the conclusion reached in that case. The second contention, however, was not ruled upon in that case, and must be considered. The deed merely recites, as one of its considerations, assumption by the *Northwestern* of all the existing debts, liabilities, and obligations of the Lake Shore. There is no other evidence of any agreement or assumption. Does that support the finding? Appellant contends not, for several reasons: first, that the word "assumption" is not equivalent to an agreement to pay such liabilities; secondly, that, if it is, there is nothing to support an inference of intention in the parties that the agreement was for the benefit of the petitioner, so as to give him direct right of action thereon.

The contention that an agreement to assume a debt or liability is not an agreement to pay it is supported by no argument beyond the fact that in nearly all the cases which have come before this court the phrase used has been "assumes and agrees to pay." The extent, therefore, to which such argument goes is to establish that we have not, in those cases, been called on to decide the effect of "assumption" alone. Other courts, however, have not been so exempt. Industry of respondent's counsel has discovered numerous instances of the use of the word "assume," in all of which

it has been construed to include the duty of payment, if the assumption be of a debt, and of payment to the creditor. *Braman v. Dowse*, 12 Cush. 227; *Locke v. Homer*, 131 Mass. 93; *Schley v. Fryer*, 100 N. Y. 71; *Stout v. Folger*, 34 Iowa, 71; *Sparkman v. Gove*, 44 N. J. Law, 252; *Mills v. Dow's Adm'r*, 133 U. S. 423. No decision has been cited in contradiction of these holdings. They seem to us entirely correct in principle and reason upon the subject now under consideration. "To assume" is defined by the lexicographers as "to take upon one's self," "to undertake," "to adopt." Obviously, to take upon one's self or to adopt the obligation or the liability of another is to put one's self in the place of that other as to such obligation or liability, to become bound as such other was bound. An assumption is broader than a promise to pay, as "liability" or "obligation" is broader than "money debt" in significance; but the broader term naturally and necessarily includes the narrower, in the absence of exception. As the liabilities and obligations of the Lake Shore, though covering other things, clearly included its duty to pay debts, so the assumption by the *Northwestern* bound it to pay the debts, as well as to perform the other obligations of the former company. The reason for the use of the word "assumption" alone in this connection in the deed is rendered obvious in the light of the situation. No other would have been broad enough. The Lake Shore was a railway company in full operation. Its undertakings were, of course, various. Freighting contracts, rent and hire of switch, track, and dockage privileges, outstanding mileage tickets, maintenance of a steamboat line, are but a few of the liabilities and obligations under which it rested, and as to which its grantee undertook to perform all its duties. The assumption of a debt includes the duty to pay it as fully as if the latter words were used. We thus reach the conclusion that the evidence — namely, the deed — fully supports the finding that appellant did assume and agree to pay

all the existing debts, liabilities, and obligations of the Lake Shore; not impliedly, as counsel suggest, but by express agreement, evidenced and declared by the deed under which title to the railroad property is held and enjoyed. *Vilas v. Dickinson*, 13 Wis. 488; *Stites v. Thompson*, 98 Wis. 329, 331.

The conclusion thus reached — that the finding is supported by the evidence — brings this case again to identity with the *Kuhl Case* on this immediate subject, for the finding there considered was in the same words. We might well rest our present decision on that authority, but it may be well to consider some of the earnest argument of appellant's counsel against the existence of direct personal liability to petitioner. He urges upon us an intimation in *Electric Appliance Co. v. U. S. Fidelity & G. Co.* 110 Wis. 434, where it was said: "There are cases going to the limit of holding that, to entitle the third person to recover upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for his benefit. . . . We consider the true rule to be that there must not only be an intent to secure some benefit to the third party, but there must be a promise, legally enforceable." The insufficiency in the bond under consideration in that case was that it did not require or promise any payment to the materialmen seeking to enforce it, merely protection to the obligee party; hence, of course, there was no apparent intent to benefit the materialmen. Clearly, if the performance of a contract must necessarily benefit the third person, an intent to accomplish that result must be presumed. Payment direct to the third person is, of course, a benefit to him, and, if that is required by a contract, the intent to so benefit is beyond question. It is not essential that the individual claimant should have been specifically in mind. If he falls within a class to whom payment is agreed to be made, that suffices. An agreement

to pay all creditors is as surely intended for benefit of each as if he were specified by name. *Houghton v. Milburn*, 54 Wis. 554; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 56. That the agreement before us contemplated payment direct to the creditors cannot be doubted. An agreement to hold the Lake Shore harmless against its liabilities, nay, even an agreement to pay its obligations, might be ambiguous, for it might contemplate only payment to the company in reimbursement. An agreement to assume, however, is subject to no uncertainty. By that the promisor takes upon himself — adopts — the obligation or duty of the other. That duty or obligation is to pay to each creditor the amount of his debt, to discharge each liability to the same person and in the same manner as the Lake Shore was bound to do. These considerations constitute a clear distinction from *Simson v. Brown*, 68 N. Y. 355, cited by appellant, even if that case were recognized as authority. There a penal bond was merely conditioned upon paying a debt owed to a third person by the obligee, and upon holding obligee harmless. The third person was held not entitled to sue because there was no *promise* to pay him, merely a promise to pay a certain sum to the obligee unless the debt were paid to such other. Whether or not we should agree with that construction of the bond is immaterial. Upon that construction the case was decided, recognizing the proposition we now assert,— that a *promise* to pay to a third person does evince an intent to benefit him.

Another consideration is quite conclusive of the intent of both parties to the agreement in question that appellant was to become bound directly to the creditors of the Lake Shore; that is the fact that such construction has been given to assumptive agreements in conveyances at least ever since *Bishop v. Douglass*, 25 Wis. 696, decided in 1870, and followed by many other decisions, among them *McClellan v. Sanford*, 26 Wis. 595; *Bassett v. Hughes*, 43 Wis. 319;

Palmeter v. Carey, 63 Wis. 426. By these cases the law had, before this deed was made, become entirely well settled that such agreements confer right of recovery upon the third party creditor against the promisor, and it must be presumed the parties intended such result. The rule of the above authorities has since been repeatedly confirmed. *Enos v. Sanger*, 96 Wis. 150; *Kuener v. Smith*, 108 Wis. 549.

The petition is vigorously assailed for noncompliance with sec. 1846, Stats. 1898. It is, of course, apparent that that section and the following were framed to regulate proceedings upon an original application by a railroad company for condemnation of land before the same had been taken, and we have heretofore had occasion to suggest that, in the nature of things, they cannot be literally applicable to a proceeding by the owner of property under sec. 1852, after the railroad company has taken and occupied land and he is proceeding, not technically to effectuate condemnation, but to secure compensation for that taking upon the theory of a contract to pay him, implied by the statute from the act of taking. *Babcock v. C. & N. W. R. Co.* 107 Wis. 280. In such a proceeding we see no reason why the ordinary rule as to liberality in the construction of pleadings should not apply, for the petition becomes, in substantial effect, a complaint in an action on contract. Nevertheless, there does remain so much characteristic of a proceeding *in rem* as that from the final determination in the proceeding is to result judicial determination of the extent of real-estate rights acquired by the railroad, as well as the amount of compensation which it must pay therefor. The adjudication becomes a muniment of title, and should, therefore, be so definite as to permit of no ambiguity in the extent either of the real estate affected or of the rights of the company therein. The petition should be broad enough and definite enough to support such a finding and judgment. We cannot commend either the petition or the finding in this case

as fully satisfying these requirements. The petition goes no further than to declare the existence of the track in a certain street opposite petitioner's premises. As the track is but about five feet wide and the street presumably sixty feet, this is no very definite location. The ordinance permitting the laying of the track, and referred to by date in the petition, is no more specific. The finding, however, reduces the ambiguity by fifty per cent., for it locates all the railway company's rights upon the north half of the street. One purpose of definiteness, at least in the finding, is to enable the commissioners to intelligently fix the compensation, and that they cannot do unless they know what the railroad company is to have and the claimant to lose. The petition and finding are not entirely satisfactory in that respect, and, if we could see that prejudice therefrom would result to the appellant, we might feel obliged to reverse. It is to be noted, however, that the defects consist merely in lack of definiteness and specification, which might have been cured upon proper objection by the appellant, if prejudicial to him. The petition might have been amended on proper objection, and such defects in the finding avoided upon a request calling the circuit court's attention thereto. Upon careful consideration of the entire record, we construe the court's finding as adjudicating that the appellant and its grantor have taken, and upon making compensation will be entitled to enjoy, the privilege of maintaining a switch track, at such place as they please and the city will permit, on the north half of Quay street. Such right the Lake Shore obviously applied for and received from the city. The ordinance does not limit them to any particular place in the street; indeed, the limitation to the north half now comes for the first time in the finding. In this view of the situation, we reach the conclusion that the finding is sufficiently specific, construed as above stated, to enable commissioners to intelligently fix the compensation which the petitioner should receive for injury or dam-

age to his property from the obstruction of the north half of Quay street opposite the same, and that the appellant is not prejudiced so as to require reversal, in the light of the directions of sec. 2829, prohibiting reversal by reason of any error or defect in pleadings or proceedings which does not affect the substantial rights of the adverse party.

By the Court.— Order appealed from is affirmed.

A motion by the appellant for a rehearing was submitted on the brief of *Edward M. Hyzer*, for the motion, and that of *G. G. Sedgwick*, *contra*.

The motion was denied September 24, 1901.

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LUDINGTON, Appellant, vs. PATTON and others, Respondents.

May 24—September 24, 1901.

Wills: Election by widow: Trusts and trustees: Omission to inform widow of her legal rights: Failure to elect: Intent: Relief in equity: Mistake of law: Fraud: Limitations: Laches: Rescission of contract: Offer to restore: Pleading: Circuit and county courts: Jurisdiction: Equitable relief against judgment: Election between remedies: Accounting.

Harrison Ludington died testate, leaving substantially all his estate, upwards of $1,250,000 (part being real estate under lease with rent reserved, his wife having joined in the lease), to trustees who were also named as executors, in trust for the benefit of his widow, who had two adult children by her former husband, her provision being less than one fourth in value of her legal rights, and the balance to his six children by a former wife. The will was read immediately after the funeral in the presence of the widow, the trustees, who were sons-in-law of the testator, and the children mentioned except one daughter of the testator. One of such trustees then said the provision for the widow was insufficient, to which she assented. He then announced that the heirs would consult as to making some concessions to the widow, and they all retired for

that purpose. Thereafter, on the same day, the trustees, on behalf of the heirs, offered to increase the allowance to the widow, such increase not making the entire provision for her equal to one half the value of her legal rights. In reliance upon the trustees, as they had good reason to know, to treat her justly, and in the belief, induced by their attitude in the matter, that she was dependent upon the heirs for what she might obtain in excess of the testator's provision for her, that they were all disposed to treat her generously, and that their offer was a liberal allowance for her in view of all her rights, she accepted it. She was then informed that she would be expected to sign the necessary paper to consummate the transaction and a petition for the probate of the will. Subsequently she signed such paper, it being presented by the attorney for the trustees, a person who had for many years acted as attorney for her husband and upon whom she relied, as the trustees had reason to know, to guard her interests in common with the interests of the others. No explanation was made to her of the nature of the paper so as to impress upon her mind its bearing upon her legal rights in the estate. It in terms sold and conveyed all such rights to the trustees in consideration of the allowance agreed to be made to her. The contract was carried out on both sides for over six years. When it was made, the widow was informed by the trustees that the value of the estate was about $1,000,000. It was in fact worth much more than that, and soon after the transaction she knew that fact by public report, but did not know of or appreciate the rights which she had signed away, and did not become informed thereof till shortly before the commencement of this action. The probate of the estate was seasonably completed and a decree regularly entered confirming the title to the property in the trustees upon the trust named in the will as modified by the aforesaid contract. The widow did not form any intent, within the year after the will was presented for probate, or theretofore, to take the provision made for her by law. She did not, during such time, know of her rights in the matter, but was induced to believe, as indicated, that she was dependent upon the favor of the heirs for any addition to the allowance made for her by the will. She commenced an action to rescind the contract, made as stated, on the ground of fraud, without restoring or offering to restore what she had received thereunder, but the complaint indicated her willingness to do equity in the premises. Subsequently she commenced two actions at law against one of the trustees for damages for the alleged fraud, which were discontinued before the action

in equity was concluded. The heirs were not materially injured by delay in the commencement of the equitable action. *Held:*

1. The executors and trustees were trustees for the widow as regards her statutory rights in the estate, and, independent thereof, they occupied a position of trust and confidence towards her.

2. The executors and trustees did not owe the widow any duty to inform her of her legal rights in the estate of her husband or the value thereof, or how to secure the same, so long as they made no effort to extinguish such rights by purchase or otherwise but remained passive in the matter.

3. When they approached the widow to extinguish her legal rights in the estate by purchase, they owed the same duty to her to disclose everything within their knowledge affecting her rights as any trustee owes to his *cestui que trust* under similar circumstances. They should have fully disclosed to her all the knowledge which they possessed and should not have bought in her interest in the estate to her disadvantage.

4. The statute giving to a widow one year after the filing of the petition for the probate of her husband's will, within which to elect to take the provision out of her husband's estate made for her by law, is a statute of limitations, and when it has fully run against her it extinguishes her statutory widow's rights beyond the power of legal or equitable remedies to relieve her, in the absence of fraud entitling her to relief upon the ground of equitable estoppel.

5. If a trustee deals with his *cestui que trust* to the disadvantage of the latter, such *cestui que trust* can repudiate the transaction upon discovering the fraud, hold the trustee responsible for damages for the wrong, or charge him upon a constructive trust of any property wrongfully obtained.

6. In all cases where a trustee by contract with his *cestui que trust* obtains the interest of the latter in the subject of the trust, the transaction is presumed to be fraudulent and void, casting upon the trustee the burden of affirmatively showing, clearly, that the two acted at arm's length in the transaction or that it was to the advantage rather than to the disadvantage of the *cestui que trust*, and that he was given all the information possessed by the trustee, and that the latter acted in the utmost good faith.

7. The disability of a trustee to deal for his own gain with his *cestui que trust* in respect to the subject of the trust, extends to any such dealing for the benefit of others.

8. The statute of limitations (sec. 4222, Stats. 1898) commenced to run from the time the widow knew of the fraud constituting

the ground of her cause of action or might have known thereof by the exercise of ordinary care.

9. The trustees being chargeable with having created in the mind of the widow the impression that she was dependent upon the heirs for any addition she obtained to the provision made for her by her husband, sec. 4222, Stats. 1898, did not commence to run against her, as to the contract made with the trustees, till she obtained, or by the exercise of ordinary care might have obtained, information as to the extent and nature of her legal rights.

10. The fact that the failure of the widow to take her legal rights grew out of a mistake of law does not militate against the power of equity to grant her relief, since mistakes of law upon the part of a *cestui que trust*, induced by the trustee, or such mistakes occurring between persons where analogous relations exist, are relievable in equity as readily as mistakes of fact.

11. Mere delay in asserting a right, short of the limitation fixed by statute, does not bar the right in equity.

12. In respect to an action in equity for the rescission of a contract on the ground of fraud, previous restoration or offer to restore what was received thereon is not a condition precedent to the right to commence the same, as in case of an action at law. In equity it is only necessary to show by the complaint a willingness to do equity, and a failure in that regard does not go to the cause of action unless taken advantage of by a special demurrer. A demurrer *ore tenus* is not sufficient.

13. The doctrine that a person must stand upon his contract or rescind it *in toto* and restore or offer to restore all he received thereon so far as strict equity requires, does not apply to an action in equity to rescind a contract on the ground of fraud, except as regards willingness to submit to a complete restoration of the original relations between the parties and the judgment to be entered in the case.

14. An action at law to recover back that which has been paid upon a contract void for fraud, supposes a precedent rescission of the contract by act of the plaintiff; an action in equity to rescind a contract supposes need of equity to effect that end and looks to the decision in the action to accomplish it and to impose such terms of the rescission as may be deemed equitable under all the circumstances.

15. A court of general jurisdiction, like the circuit court, has jurisdiction concurrent with the probate court in all matter connected with the settlement of estates. Such jurisdiction is suspended by the jurisdiction of the probate court in the absence of

peculiar circumstances rendering the latter jurisdiction inadequate to furnish as complete and effective a remedy as the former.

16. Where a judgment gives to a party to a proceeding in which it was entered an unconscionable advantage, the person aggrieved thereby may, by proceeding seasonably, obtain relief in equity by an action bearing directly upon the party to prevent him from enjoying the fruits of the wrong, such action not affecting the judgment or impeaching its validity in any way.

17. The commencement of an action at law for damages upon the theory of an existing contract, after the commencement of an action to rescind such contract on the ground of fraud, does not affect the latter action. The commencement of the first action constitutes an irrevocable choice between inconsistent remedies.

18. The trustees and executors, having by their wrongful treatment of the widow prevented her from forming an intent to take the provision made for her by law, are chargeable with having fraudulently prevented her from making the election necessary to secure such provision, since, had she formed such intent, she would probably have executed it.

19. The principle that no man can in equity profit by his own wrong, and the principle that if a person be fraudulently prevented from doing an act it will be considered in equity, as against the party guilty of the fraud, as if the act were done, apply, precluding the trustees from profiting in their representative capacity by the enrichment of the estate by the failure of the widow to secure the provision made for her by law.

20. No man can take advantage of his position as trustee to deal with his *cestui que trust* to the disadvantage of the latter and successfully challenge a court of conscience to remedy the mischief thereby accomplished, if it be seasonably invoked.

21. The trustees under the will are liable to account to the widow as constructive trustees for all the property and the use thereof, which she would have come into the possession of by an election to take the provision made for her by law; and the heirs are liable to account in the same manner for all property that has been distributed to them which justly belonged to her, and their interests in the trust property still in the hands of such trustees are chargeable with their obligation in that regard.

22. In the accounting by the trustees, the rents received from real property under lease at the time of the death of the testator must be treated as rents and profits of real estate in which the widow was entitled to be endowed, notwithstanding she joined with her husband in making the lease.

23. In the accounting between the trustees and the widow she must account for all she has received from the estate, and the trustees, under the circumstances, should be allowed their costs and charges upon substantially the same basis as allowances are made to trustees of an express trust.

DODGE and BARDEEN, JJ., dissent.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Appeal from a judgment dismissing plaintiff's complaint, in an action against the trustees and heirs of the estate of Harrison Ludington, deceased, to rescind, on the ground of fraud, a contract whereby the plaintiff, his widow, surrendered her legal rights in such estate, and to recover the damages she sustained by being induced, as alleged, to enter into such contract. The issues litigated upon the trial and the matters covered by the evidence are sufficiently indicated in the following summary of the findings of fact made by the trial court:

In 1875 the plaintiff, a widow fifty-four years of age and mother of three children by her deceased husband — one a married son with whom she was residing in the city of Milwaukee, one a daughter of ten, and the other a daughter of eight years of age,— and who was enjoying the income of an estate of $80,000 left by her deceased husband and settled upon her by his will during her widowhood, was married to Harrison Ludington of the city of Milwaukee, Wisconsin, a widower sixty-five years of age having six children by his deceased wife, and reputed, to the knowledge of plaintiff, to be a man of wealth. After such marriage Mr. Ludington and plaintiff resided together in the Ludington homestead in Milwaukee until June 17, 1891, at which time he died. Plaintiff resided in New York up to 1873, when she removed to the city of Milwaukee to reside with her son, and so resided, as before indicated, at the time of her second

marriage. After such marriage plaintiff's daughters resided with her at the Ludington home, one till she died and the other till about six months before the death of Mr. Ludington. At the time of such marriage Mr. Ludington's four eldest children resided away from home, three of them being married. His two youngest children were infant girls and resided at home. Some time subsequent to the marriage, Harrison Ludington, Jr., one of Mr. Ludington's sons, became afflicted with blindness and returned to reside with his father, and so resided till the latter's death. Before such death occurred the two infant daughters of Mr. Ludington, before mentioned, grew to womanhood, were married, and resided away from the parental roof. Plaintiff, by the terms of her first husband's will, forfeited, by the second marriage, her interest in his estate to her children. Mr. Ludington was mayor of the city of Milwaukee when he married plaintiff, and thereafter became governor of the state of Wisconsin. For many years before he died he was a significant figure in the business and political circles of the state. His death occurred June 17, 1891. He left a will devising and bequeathing all his property to A. G. Van Schaick and *James E. Patton*, two of his sons-in-law, as executors and trustees for the use and benefit, in the main, of his six children. His funeral was in the afternoon of June 20, 1891.

Upon the return of the family from the funeral, to the Ludington homestead, at the suggestion of Mr. Van Schaick, the will was read in the presence of the plaintiff, the other executor and trustee named in the will, the son and daughter of plaintiff, and all the beneficiaries thereunder except the wife of Mr. Van Schaick. By the terms thereof plaintiff was given an annuity of $3,000 per year for life, the use of the homestead and its belongings as a home for life, and the sum of $10,000 in money, outright, or $15,000 in money in lieu of the $10,000 and the use of the homestead if she should choose to remove therefrom. It was stated in the

will that such provision was in accordance with an understanding between plaintiff and the testator, which provision was deemed, by both of them, just and equitable.

Plaintiff had great affection for her son, who was present with her upon the occasion just mentioned, but she did not turn to or rely upon him in any way in business matters. She was, when the will was read and during the subsequent transactions leading up to the making of the written contract hereafter mentioned, self-possessed and competent to transact business, but was, in a measure, mentally and physically exhausted by her exertions in the care of Mr. Ludington during his last illness, and the anxieties and grief incident to her situation and the scenes through which she had passed. When the provision made for her was read as before stated, Mr. Van Schaick remarked that it was inadequate for her support, and she said that it was not sufficient therefor. Thereupon the heirs and the husbands of the married daughters, including Mr. Van Schaick and *Mr. Patton*, retired to the latter's home for a consultation, saying, as they departed, that they would communicate the result of their conference to plaintiff during the day. Thereafter, in accordance with such promise, *Mr. Patton* and Mr. Van Schaick returned to the Ludington home and reported to plaintiff that they were authorized, on behalf of the heirs, to offer her $5,000 per year in lieu of the $3,000 mentioned in the will, $25,000 in money instead of the $10,000, to complete the home in Kenwood, a suburb of Chicago,—the construction of which was commenced by Mr. Ludington with the knowledge of Mr. Van Schaick and with the approval of plaintiff, designed as her home after his death if she so desired,—and to add to the original design of such Kenwood home a stable, and convey the property to her prepared for occupancy, free from all incumbrances, and allow her to take such of the household furniture and horses, carriages, etc., as she might desire. She verbally accepted

such offer and was thereupon informed by Mr. Van Schaick and *Patton* that she would be expected to sign a petition for the probate of the will and a written instrument embodying the contract between her and the heirs and themselves as trustees of the estate and executors of the will. She was further informed, at the interview, that the estate would be probated as worth about a million dollars.

There was no communication after such interview, between the plaintiff and either Van Schaick or *Patton* or either of the Ludington heirs in regard to the estate or plaintiff's rights therein. Five days after the verbal contract made as aforesaid, an attorney, employed by Van Schaick and *Patton*, presented to plaintiff, for her signature, a petition for the probate of the will, in which the value of the estate was stated at $500,000 in real estate and $550,000 in personal property, which petition she signed. The value of the real estate was fairly stated in the petition, but the value of the personal property was underestimated. Certain lumber stock, estimated to be worth $400,000, was worth at least twenty-five per cent. more, which fact was known to Van Schaick and *Patton*, and there was other personal property of the value of about $150,000 at a fair estimate. The real value of the estate was considerably in excess of the figures named, as will hereafter appear.

Five days after the petition for the probate of the will was signed as aforesaid, the attorney who presented it to plaintiff for her signature again appeared at the Ludington home and presented to her a written instrument, informing her that it was drawn in accordance with the verbal agreement made between her and Van Schaick and *Patton*. He read such instrument to plaintiff and explained it, but the exact nature thereof as regards its effect upon her legal rights in the estate was not explained to her, neither did she understand such matter, as will be hereafter more particularly stated. Upon such explanation of the paper being

made, plaintiff signed and acknowledged it. It was thereafter signed by Van Schaick and *Patton* as executors of the will and trustees of the estate, and by all of the Ludington children, and it was also duly acknowledged by all of such additional signers. The petition for the probate of the will was duly filed in the probate court a few days after it was signed, and on the same day the written contract was filed for record in the office of the register of deeds of Milwaukee county. By the terms of such contract plaintiff submitted to the will and released all claims thereunder and also all her legal rights in the estate of the deceased, and in form conveyed to the trustees, Van Schaick and *Patton*, all her right, title, and interest, present and future, in such estate, "to the end and effect that the same be administered under said will and be disposed of by the executors and trustees in the same manner and with the same effect as though the plaintiff had not survived her husband and had left no issue her surviving." And for greater certainty as to the full consummation of the purpose of the contract, it was provided that plaintiff should hold herself in readiness at all times to make any additional paper that might be deemed necessary to that end. In consideration of the rights conveyed by plaintiff as aforesaid, the trustees and heirs, in the writing, agreed and bound themselves in substance according to the terms of the verbal contract before mentioned, it being provided that $25,000 should be paid plaintiff as soon as the will was admitted to probate, that she should be paid the annuity of $5,000 per year at such times as she might desire, and that such payments should be secured to her in any reasonable and proper way she might desire.

During the period covered by the transactions related in regard to the will and contract, statements were published in the Milwaukee city papers relating to the Ludington estate, placing the value thereof at $2,000,000. The petition for the probate of the will, the contents thereof and of the

contract before mentioned, and the nature and amount of the estate, were referred to in the public prints with particularity; and such published matter was brought to the attention of plaintiff, who made clippings from the papers containing such references, which she sent to her relatives in the East.

The agreement contained in the written contract was carried out by the defendants,— the property, aside from the annuity, paid or conveyed to plaintiff being of the value of $48,000, no part of which has been returned by plaintiff or offered to be returned, except that a deed of the Kenwood property was tendered to defendants upon the trial of this action and was deposited with the clerk of the court for their use; and further, in the prayer for relief, the right of defendants to have credit for the sums paid to plaintiff, in determining the amount she would be entitled to in case of a recovery, was recognized. Plaintiff, since about the time of the execution of the contract, has been in possession of a copy thereof. She visited the East shortly after the contract was made, thereafter returned to the city of Milwaukee, and subsequently, in the fall of 1891, removed to the Kenwood property near Chicago, where she has since resided, her son making his home with her. During such residence in Kenwood she has often visited friends in the city of Milwaukee, but not the members of the Ludington family. In September, 1891, by request, plaintiff joined with the beneficiaries of the trust in waiving the filing of any inventory by the executors in the probate of the estate.

Mr. Van Schaick died in December, 1891, after which *Mr. Patton* administered the estate as sole executor till the probate thereof was concluded in December, 1892. At that time the executors' accounts were finally passed upon, the probate of the estate adjudged to be at an end, and the property, in due form of law and according to the scheme of the will, was assigned to *Mr. Patton* and to *Lewis S.*

Patrick — the latter being appointed in place of Mr. Van Schaick, deceased,— as trustees for the uses and purposes mentioned in the will except as varied by the contract aforesaid; and they still possess the subject of the trust.

When the preliminary agreement was made between plaintiff and Van Schaick and *Patton*, she and her son understood that a widow was legally entitled to "a third" in her husband's estate, but neither of them had any clear conception of her legal rights as regards an election to take the provision made for her by law; and she was not informed on that point at any time, either by Van Schaick or *Patton*, or by the attorney whom they employed to obtain her signature to the written contract. Both Van Schaick and *Patton* understood the nature of plaintiff's legal rights, but they not only failed to inform her, at the time of negotiating with her to obtain, for the benefit of the Ludington children, her interest in the estate, or at all, of the nature of such rights or the manner of asserting them, but failed to suggest that she obtain information in that regard or to in any way put her upon inquiry as to her legal rights in the matter. She did not know, at any time before the execution of the written contract, or before the expiration of the year limited by law for her to do so, that she could file with the county court her election to take the provision made for her by law in lieu of the provision made for her by the will. The executors and trustees, from first to last, treated plaintiff, as testified to by *Mr. Patton*, as a person capable of looking out for her own interests. They did not wilfully misrepresent or misstate to her any matter to her prejudice, but they concealed the facts and the true nature of the plaintiff's rights *from her* when they should have communicated the same *to her* because of their relation *with her*, as executors of the will and trustees of the estate. They did not say anything to prevent plaintiff from obtaining the necessary information to enable her to act intelligently in

regard to her rights, or do anything to that end or which had that effect, except to keep silent as to her rights instead of informing her of her relations to the estate under the law, as they ought to have done before dealing with her in regard thereto. She did not, within the time limited by law, form a purpose to elect not to take the provision made for her by the will. She rested upon her rights under the contract till 1898, when this action was commenced to rescind it and to recover compensation for the loss which she suffered by not insisting, at the proper time, upon her legal rights in her husband's estate. The circumstances leading up to such commencement were as follows:

In November, 1895, Harrison Ludington, Jr., died, leaving a widow. Soon thereafter information was conveyed to plaintiff that such son had accumulated prior to his death, from his income from the estate, the sum of $30,000, and that his widow claimed a large sum out of the estate as his sole heir and legatee. The widow commenced an action to enforce her rights as such sole heir and legatee. About the same time inquiries were made of plaintiff, by friends, as to why she did not stand upon her legal rights in her husband's estate. The result of such circumstances was that plaintiff became suspicious that the estate was larger than she had supposed. Thereupon she communicated her suspicion to Mr. William M. Jones, an attorney of Chicago, who was related to her family. Thereupon such attorney employed legal assistance in the city of Milwaukee, and he and his assistant made an investigation which led to the discovery of facts from which a conclusion was reached that plaintiff had been wronged. This action was then commenced, without any dissatisfaction being previously expressed to the trustees of the Ludington estate or the heirs of such estate with the contract.

After this action in equity was commenced, plaintiff instituted an action at law, in a court in the city of Milwaukee,

having jurisdiction of the subject thereof, to recover damages from *Patton* upon the same grounds as those alleged and upon which a recovery is sought in this case. Such action was dismissed without any issue having been brought to trial. Subsequently a similar action was commenced against *Mr. Patton*, in a court in the city of Chicago having jurisdiction of the subject thereof, service being obtained upon him while he was on a visit to that city. That action was dismissed while this action was upon trial.

Since the death of Mr. Harrison Ludington, Sr., the net income from his real estate has been from $17,000 to $21,000 per year, $10,000 per year being accounted for by the rental of property called the "Pabst corner," leased during the lifetime of Mr. Ludington for ninety-nine years, plaintiff joining in the lease as his wife. A claim that Mr. Charles Tobey, the plaintiff's son, was shown an itemized statement of the property of the estate soon after the representations made to plaintiff by the executors, as to the value thereof, to corroborate their estimates, though testified to by *Mr. Patton* and corroborated by one of the Ludington heirs and the husband of another, but denied by Mr. Tobey, was rejected as untrue for the reason, among others, that it was inconsistent with the knowledge, possessed by the executors, of the record of Mr. Tobey, and inconsistent with the fact that they did not, by their treatment of him at any time, indicate that they regarded him as of any consequence at all in their dealings with plaintiff. The value of the estate in 1891, as known by Van Schaick and *Patton* when they made the arrangements with plaintiff embodied in the written contract, and when they informed her as regards the probable value of the estate, was $1,238,949.87, of which $727,099.58 was personalty, and $511,850.29 realty, exclusive of household furniture taken by plaintiff and some land in the town of Wauwatosa.

The attorney who obtained the signature of plaintiff to

the contract was for many years prior to the death of Mr. Ludington his confidential agent, to the knowledge of plaintiff, and she believed, when she dealt with such attorney, that he was acting for her as well as for the other parties interested. She received from him no information whatever in regard to her legal rights and no information that he was not acting in the capacity that she supposed. The plaintiff's business, as regards her first husband's estate, was faithfully and honestly conducted by her two brothers, who were merchants in the city of New York, and she relied wholly on them in that regard. In all that plaintiff did in making the verbal contract and in signing the written instrument which she supposed embodied such contract, she relied wholly on *Mr. Patton* and Mr. Van Schaick and their attorney, supposing that each and all were acting in good faith and in her interest as well as in the interests of the Ludington children. Prior to the summer of 1898, when plaintiff became suspicious as to the correctness of her notions as regards the value of her husband's estate when she made the contract releasing her legal rights therein, she had no knowledge as to the real value of such estate or the fact that she had been induced to part with her legal rights therein for an entirely inadequate consideration.

On the facts related, as found by the court, a judicial conclusion was reached that *Patton* and Van Schaick breached their duty to plaintiff as trustees of the Ludington estate for her as well as for the Ludington children, in that they neglected, before dealing with her to obtain a release of her legal rights in such estate, to explain to her the nature of such rights; also to inform her of the nature and amount of the income of the real estate of which Mr. Ludington died seised and the real value of the lumber corporation stock estimated by them to be of the value of $400,000; that plaintiff seasonably commenced her action for equitable re-

lief if she is entitled to any such relief on the facts; that she was not guilty of laches which would bar her, either in equity or under any statute of limitations of this state; but that her right to any interest in the estate of her husband, other than that which was secured to her by the will or by the voluntary act of the heirs, depended upon her electing to take the provision made for her by law within one year, in the manner and form required by the statute on that subject; and that, as she never made any such election and never intended to make any, she lost her rights, and equity is powerless to relieve her. Judgment was entered in accordance with such conclusions, dismissing the action, and plaintiff appealed.

For the appellant there were briefs by *Jones & Jones* and *Hugh Ryan*, attorneys, and *Miller, Noyes & Miller*, of counsel; and a supplemental brief by *Jones & Jones*, solicitors, and *William M. Jones*, of counsel, and the cause was argued orally by *Geo. P. Miller*.

In the principal brief it was argued, among other things, that the executors and trustees were in a confidential relation to the widow, and their purchase of her interest in the estate without the fullest disclosure of facts and law was fraudulent. Cassoday, Wills, § 507; 1 Lewin, Trusts (Flint's ed.), 658; *Leach v. Leach*, 65 Wis. 294; *Parry v. Parry*, 80 Wis. 130; *Disch v. Timm*, 101 Wis. 179; *Doyle v. Welch*, 100 Wis. 24; *Statham v. Ferguson's Adm'r*, 25 Grat. 28; *Haviland v. Willets*, 141 N. Y. 35; Story, Eq. Jur. § 187; *Watkins v. Brant*, 46 Wis. 419; *Konrad v. Zimmermann*, 79 Wis. 306; *Voell v. Kelly*, 64 Wis. 504. A court of equity must undo this fraud and give the plaintiff the same rights she would have had if the fraud had not been perpetrated. Equity will always give relief for fraud, no matter how the wrongdoer obtains legal litle. Story, Eq. Jur. §§ 187, 256; 36 Am. L. Reg. (N. S.), 231; *Lord Waltham's Case*, cited in 11 Ves. 639, 14 Ves. 290; *Fox v. Hubbard*, 79 Mo. 390;

Vane v. Vane, L. R. 8 Ch. App. 383; *Dixon v. Olmius*, 1 Cox, Eq. 414; *Ellerson v. Westcott*, 148 N. Y. 149; *Lombard v. Cowham*, 34 Wis. 486. The requirement of election by sec. 2171 is not a law of inheritance, but a rule of evidence. See R. S. Wis. 1849, ch. 62, secs. 17–19; ch. 66, Mich. Stats. 1846; R. S. Mass. 1836, ch. 60; R. S. N. Y. 1827, pt. 2, ch. 1, tit. 3; R. S. Mich. pt. 2, ch. 2, tit. 1, secs. 11–13; R. S. Wis. 1858, ch. 89, secs. 17–19; Laws of 1877, ch. 106; R. S. 1878, secs. 2170–2172. The statute regulates election, and it does not interfere with the jurisdiction of equity in the case of election. *Van Steenwyck v. Washburn*, 59 Wis. 483, 505. In the case at bar equity jurisdiction rests on fraud, and in the exercise of that jurisdiction the court can act with reference to the statutory election as well as it might with election at common law. The statute on election has been frequently before this court for construction, but none of the other decisions in connection with it have any direct bearing on the case at bar. They all show, however, a strong inclination to liberality toward a widow. *Zægel v. Kuster*, 51 Wis. 34; *Application of Wilber*, 52 Wis. 295; *Wilber v. Wilber*, 52 Wis. 298; *Hardy v. Scales*, 54 Wis. 452; *Melms v. Pfister*, 59 Wis. 186; *Van Steenwyck v. Washburn*, 59 Wis. 483; *Leach v. Leach*, 65 Wis. 284; *Ford v. Ford*, 70 Wis. 20, 52; *Albright v. Albright*, 70 Wis. 528; *Beem v. Kimberly*, 72 Wis. 343, 363; *Church v. McLaren*, 85 Wis. 123; *Ford v. Ford*, 88 Wis. 122, 131; *Melms v. Pabst B. Co.* 93 Wis. 140; *Jochem v. Dutcher*, 104 Wis. 611. Whatever the nature of the statute, equity will restore to the widow her dower and statutory rights taken from her by fraud. Scribner, Dower (2d ed.), 497, and cases cited; *Statham v. Ferguson's Adm'r*, 25 Grat. 67; *Akin v. Kellogg*, 39 Hun, 252, 48 Hun, 459, 119 N. Y. 447; *Smart v. Waterhose*, 10 Yerg. 94; *Evans's Appeal*, 51 Conn. 435; *Fosher v. Guilliams*, 120 Ind. 175; *Garn v. Garn*, 135 Ind. 687; *Woodburn's Estate*, 138 Pa. St. 606; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Reed*

v. Dickerman, 12 Pick. 146. The plaintiff's mistake of law, as well as her mistake of fact, requires relief to be given her. 1 Perry, Trusts, § 184; Story, Eq. Jur. § 133; *Haviland v. Willets*, 145 N. Y. 55; *Light v. Light*, 21 Pa. St. 407; *Statham v. Ferguson's Adm'r*, 25 Grat. 28; 2 Pomeroy, Eq. Jur. §§ 847–849; *Green Bay & M. C. Co. v. Hewitt*, 62 Wis. 316; *Whitmore v. Hay*, 85 Wis. 240; *Kyle v. Fehley*, 81 Wis. 67; *Wis. M. & F. Ins. Co. Bank v. Mann*, 100 Wis. 596; *Jenkins v. Bradley*, 104 Wis. 540.

In the supplemental brief, counsel contended, *inter alia*, that the executors were trustees for all of the beneficiaries of the estate, including the widow. *Scott v. West*, 63 Wis. 555; *Leach v. Leach*, 65 Wis. 294; *Statham v. Ferguson's Adm'r*, 25 Grat. 28; *Michoud v. Girod*, 4 How. 503. The executors could not purchase plaintiff's interest in the estate, either for themselves or the children, without fully advising plaintiff of her rights, and fully disclosing to her the value of the estate, and acting in every respect with the utmost fairness; and even then the arrangement, if not advantageous to the widow, will be condemned. 1 Perry, Trusts, § 195; 1 Lewin, Trusts (1st Am. ed.), *486; *North Baltimore B. Asso. v. Caldwell*, 25 Md. 420; *James v. James*, 55 Ala. 531; *Butler v. Haskell*, 4 Desaus. Eq. 650, 705; *Leach v. Leach*, 65 Wis. 284; Bigelow, Fraud, 261, 341; *Statham v. Ferguson's Adm'r*, 25 Grat. 28; *Gandy v. Macaulay*, 31 Ch. Div. 1. Before the statutes regulating the subject of electing between dower and will were passed, the most liberal principles of equity were applied. By those principles the widow's rights were most carefully guarded against mistake, fraud, and undue influence. The statutes must be construed and limited by those principles to give effect to the right which they were intended to secure. *Sweetman v. Sweetman*, 2 Ir. Eq. 141, 152; *Woodburn's Estate*, 138 Pa. St. 606; 1 White & T. Lead. Cas. Eq. (Dickson's ed.), 431; *Watson v. Watson*, 128 Mass. 152; 11 Am. & Eng. Ency. of

Law (2d ed.), 97, 98; 2 Scribner, Dower (2d ed.), 519; *Evans's Appeal*, 51 Conn. 435; *U. S. v. Duncan*, 4 McLean, 99; *Smart v. Waterhose*, 10 Yerg. 94.

For the respondents there was a brief by *Bloodgood, Kemper & Bloodgood*, attorneys for *Sarah E. Patton* and others, and *Winkler, Flanders, Smith, Bottum & Vilas*, attorneys for *Frances L. White*, with *Jackson B. Kemper* and *James G. Flanders*, of counsel, and a brief in reply by *Jackson B. Kemper*, of counsel for *Sarah E. Patton* and others; and the cause was argued orally by *Jackson B. Kemper* and *James G. Flanders*. They contended, *inter alia*, that the plaintiff not having elected to take under the law instead of under the will, as provided by sec. 2172, R. S. 1878, can have no relief in this action. It is the filing of the notice of her election that gives her title. The court cannot substitute any thing else in place of this statutory requirement. The statute is peremptory. At common law and by our early statutes, the widow's elective right extended only to the claim of dower. Secs. 17, 18, ch. 62, R. S. 1849. Ch. 106, Laws of 1877, brought the change. A new right of inheritance was thereby introduced — a limitation on the husband's power to give away his own personal estate. But this right of inheritance accrues only upon the filing of the prescribed notice. *Church v. McLaren*, 85 Wis. 122; *Albright v. Albright*, 70 Wis. 528. The court can ingraft no exception on the statute. *Van Steenwyck v. Washburn*, 59 Wis. 483. The widow was bound to know that the law compelled her to make her election as to whether she would abide by the will in one year. Ignorance of that law is no excuse. *Akin v. Kellogg*, 119 N. Y. 441, 448. The rule that if the widow fails to elect within the time specified by the *statute* she is utterly without remedy has been uniformly upheld in every state and tribunal where the question has been raised. *Burden v. Burden*, 141 Ind. 471; *Waterbury v. Netherland*, 6 Heisk. 512; *McDaniel v. Douglas*, 6 Humph.

229; *Stephens v. Gibbes*, 14 Fla. 331; *Bierer's Appeal*, 92 Pa. St. 265; *Light v. Light*, 21 Pa. St. 407; *Fosher v. Guilliams*, 120 Ind. 172; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Ex parte Moore*, 7 How. (Miss.), 665; Schouler, Domestic Relations, § 206.

The following opinion was filed June 20, 1901:

MARSHALL, J. While appellant's counsel filed numerous exceptions to the findings of fact, and exceptions to refusals to find as requested by them, and assigned error generally on such exceptions, no particular error in that regard is found pointed out in the printed brief, nor is the subject there discussed, nor was there anything in the oral argument by counsel for appellant to indicate that reliance for reversal is placed on such exceptions, other than the exception to the finding that appellant was not prevented from discovering her statutory rights by the conduct of defendants. The contention is, as we understand it, that the conclusion of law upon the facts found should have been substantially in accordance with the prayer of the complaint. While that situation relieved us from any necessity of examining the evidence at any great length, in view of the importance of the case and its character the evidence has been examined, which has resulted in a conviction that the findings of fact cannot be disturbed under the rules governing that subject,— except that part thereof wherein it was decided, in effect, that appellant was not prevented from discovering and asserting her legal rights by the conduct of the defendants or any of them, other than by the failure of Van Schaick and *Patton* to fully disclose to her the knowledge they possessed as to the value of the estate and her rights therein before the contract was made; and the further conclusion that all the suggestions appellant's counsel made as to the facts to be found were in terms or effect embodied in the findings filed, except one to the effect that appellant would

have asserted and enforced her legal rights in her husband's estate had the executors and trustees performed their duty to her as such at the time of their acquirement of her rights. There does not seem to be any specific finding upon that point. The learned superior judge, in the conclusions of law, appears to have decided that, since appellant did not, within the year allowed to her by law, elect that she would not take the provision made by the will, and did not form any intent to so elect which was displaced by the misconduct of the executors and trustees towards her, the statute limiting the time for making such election operated upon her legal rights and extinguished them, leaving her remediless both in law and in equity, regardless of the fact that she voluntarily parted with such rights without any appreciation of their nature or value, or the manner of securing them, or the necessity for information on those points; and the duty of the executors and trustees to abstain from dealing with her for their own benefit or the benefit of others whom they represented, while she was in that state of mind, and regardless of whether, had they performed their full duty to her before such dealing, she might, or probably would, have declined to part with her rights without receiving an adequate compensation therefor. Of course, if the learned superior judge was right in that regard, then the subject matter of fact to which we have referred, not specifically covered by the findings filed, which omission is a subject of complaint by counsel, is immaterial.

Before proceeding to discuss the questions suggested in the foregoing, upon which the correctness of the judgment appealed from depends, it seems best to consider the contention made by the learned counsel for respondents, that the judgment is right on the evidence and the facts found which are strictly facts; that the conclusion reached by the trial court, that the trustees and executors were in duty bound to see that plaintiff understood and appreciated her

legal rights before dealing with her, is a conclusion of law and is wrong; that a restitution by appellant of the benefits she received under the contract she seeks to avoid was a condition precedent to any right of action to rescind it; and that she was guilty of laches.

It seems, by the argument of the learned counsel for respondents in support of the contention that the decision of the trial court is wrong, that the executors owed to plaintiff the duty to inform her as to her legal rights or to place her in the way of obtaining such information and not to deal with her till she possessed and appreciated such knowledge, that they misapprehend the scope of the decision. They argue that it was not the duty of the executors to do anything as regards instructing appellant or stimulating her to obtain information of her rights that would be liable to disturb the scheme of the will, and to that they cite, from 1 Lewin, Trusts (Flint's Am. ed.), p. 286, and Perry, Trusts (5th ed.), § 433, the elementary principle that, "Trustees would not be justified in doing any act at variance with the trust. If, for instance, they honestly believed that property accepted by them in trust for one belonged by right to another, they would not be justified in communicating to such other that he could successfully obtain the estate. Trustees have the custody of property, but do not keep the conscience of the *cestui que trust*." We fail to see the application of that principle to the facts of this case. Van Schaick and *Patton* stood in a far different relation to appellant than that of a mere trustee of the estate of Gov. Ludington for the particular uses and purposes expressed in the will. The entire property of the estate was willed to them for the uses and purposes expressed, and, just as effectually, for such other uses as the law ingrafted onto the will. The will did not disturb appellant's legal rights, except provisionally. They were written into the instrument, by force of the statute, as effectually as if

they had been expressed by the testator himself, leaving appellant the alternative of taking one provision or the other. The executors and trustees were the trustees of the property for appellant the same in the one case as in the other. To compare her situation and her relations to the executors with those of a mere stranger to a trust, as a test by which to determine the measure of the duties which such executors owed to her, is to set up an obviously false standard. Therefore, counsel's contention, in respect to the duty of Van Schaick and *Patton* towards plaintiff, so far as based on such principle, cannot be adopted.

Coming nearer to the rule governing at this point in the case are *Stephens v. Gibbes*, 14 Fla. 331, 356, and *Akin v. Kellogg*, 119 N. Y. 441, cited by respondents' counsel, to the effect that there is no duty resting upon the executor of a will making a provision for a widow, to inform such widow of her legal rights; but that she is presumed to know the law and that it is her duty to discover her rights for herself and to assert them. That such doctrine necessarily works oppressively in some cases cannot be denied. It enables an executor, — regardless of the disparity between provisions made for the widow of the testator by his will and those made for her by the law, and the degree of helplessness of such widow as regards choosing between the alternatives thereby presented or exercising any judgment in respect to the matter, and regardless of the degree of ignorance on her part of the value of the estate in which she is interested and the advantages to be secured by her by electing to take her rights under the law, and regardless of the advantages to the executor of her abiding by the will and the degree of his knowledge of her helpless condition as regards doing what is to her best interests, — simply by keeping silent, doing nothing to prevent her from securing her legal rights — by merely remaining passive throughout the entire period allowed by law for her to choose between the two alternatives

presented to her,— to see her lose such rights, reap the benefit thereof himself in whole or in part, and stand guiltless in law and in equity, as a person may, under some circumstances, see a person perish without making an effort to prevent it, reap the advantages thereby flowing to him, and stand guiltless so far as human law can reach.

Shocking as that is to a high moral sense of right and wrong, it must be admitted that the purpose of the statute (sec. 2172, Stats. 1898) providing that when a widow is put to her election as to whether she will take under the law or the will of her husband, she shall be deemed to have chosen the latter unless she files in the court having jurisdiction of the settlement of the estate, within one year after the filing of the petition for the probate of the will, a notice in writing that she elects to take the former, was to relieve the settlement of estates from the uncertainties that existed at the common law by reason of the equitable doctrine as to the time when a widow must make an election in the circumstances stated, and the binding effect thereof; that it was intended to operate as a statute of limitation, fixing with certainty a time, deemed by legislative wisdom to be reasonable, within which a widow must assert, by an affirmative act as indicated, her intention to take the rights secured to her by law in her husband's estate, or suffer the penalty of their irretrievable loss. Further, it must be admitted that such statute should be given the same force and effect as any other statute of limitations. There are no two rules governing such statutes. Equity deals the same with one as with another. It must be held, when fully run in a given case, to have absolutely extinguished the right upon which it has operated, and created in those in whose favor it has run a new right of equal dignity, as regards legal and equitable cognizance, with the one displaced by law. *Eingartner v. Illinois S. Co.* 103 Wis. 373. Such being the case, the statute in question must be en-

forced to its full effect, the same as any other limitation act, regardless of the hardship thereby inflicted in any particular case, unless circumstances exist precluding its being insisted upon under the doctrine of equitable estoppel.

What is said in the two cases above referred to, where statutes similar to ours were considered, is in perfect harmony with the decisions of this court on the same subject. In *Van Steenwyck v. Washburn*, 59 Wis. 483, the statute under consideration was held to apply even where the person put to her election was disabled from taking any action whatever by reason of her insanity. It would hardly be possible to suggest a more harsh operation of a statute of limitations than that. It was said, in deciding the case, that though such an application of the law is contrary to judicial notions of right and justice, the principle must control, that where no exception is made, in a statute of limitations, to protect the interests of the weak and helpless, the court is powerless to remedy the difficulty, since to attempt to judicially supply a remedy would be to turn aside from the judicial function and invade that of the legislature. Such is the law as declared by the courts with but very few exceptions. So far as the general principle mentioned is concerned, they are all in harmony. Courts cannot vary the effect of a statute of limitations in any case because of mere hardship. If the law be not so unreasonable as to violate constitutional rights of property, it must be enforced as written, regardless of judicial notions of whether it is right or wrong tested by a correct standard of legislative policy. Many instances are reported in the books where that doctrine has been as rigorously applied to statutes similar to the one under consideration as by this court in the case cited. *Fosher v. Guilliams*, 120 Ind. 172; *Church v. McLaren*, 85 Wis. 122; *Sherman v. Newton*, 6 Gray, 307; *Boone's Representatives v. Boone*, 3 Har. & McH. 95; *Hinton v. Hinton*, 6 Ired. Law, 274; *Lewis v. Lewis*, 7 Ired. Law, 72; *Col-*

lins v. Carman, 5 Md. 503, 524; *Heavenridge v. Nelson*, 56 Ind. 90, 93; *Pinkerton v. Sargent*, 102 Mass. 568.

Some states are more regardful than this state of the probability that a widow may not have capacity to act upon her own judgment in such an important matter as that under consideration, by providing by statute for her protection against ignorance and mistake. Provision is made, either that some person appointed by the court shall investigate the situation and act for the widow, so as to secure that which will be the most valuable to her, or that a guardian shall be appointed to act for her, or that she shall act only upon receiving full information of her rights by the executor or the judge of the court having supervision of the settlement of the estate, or that if she make an improvident election without negligence and through ignorance of the facts she may make a new election (Code Ga. [1882], § 1766; *Johnston v. Duncan*, 67 Ga. 61; Rev. Code Del. [1874], 534, § 7; Code N. C. [1883], § 2108; Ann. Stats. Ohio [1897], § 5966); while other states have held that equity may, for good cause, even where no fraud is claimed, extend the time for making the election, contrary to the rule heretofore discussed, or allow an election to be withdrawn or changed even after the expiration of the time limited by law for making such election (*U. S. v. Duncan*, 4 McLean, 99; *Smither v. Smither's Ex'r*, 9 Bush, 230; *Grider v. Eubanks*, 12 Bush, 510). In *U. S. v. Duncan* the court had under consideration the right of a widow in the estate of her husband under the statutes of Illinois. Provision was made for her in the will. The statute required her to elect substantially in the manner required by the statute of this state, the time, however, being limited to six months. She failed to make her election because of her 'utter ignorance of her husband's estate and her want of means within the time limited to discover the facts so as to enable her to act intelligently in regard to the matter.' The court treated

the statute as so unreasonable when applied to the case in hand, and understood in the literal sense of the words thereof, that a case was presented calling for judicial construction; and in that view it was held, in effect, that the court was permitted to say, on equitable principles, when a statute should and when it should not bar a widow's rights. This language was used: "From the nature of the case it must be perceived that there are cases in which the election could not be made in six months, and it would not be extending the principles of equity beyond their limits in such case of hardship, to relieve a widow." The character of the statute as one of limitations calling for enforcement like any other of its kind, and the well-settled principle that a court of equity cannot ingraft exceptions upon such statutes to suit its notions of right and justice, were not recognized in that decision, nor in subsequent decisions, some of which, cited to our attention in the briefs of counsel, refer to *U. S. v. Duncan* for authority. It needs no discussion to demonstrate that, under no circumstances, except such as create an equitable estoppel, can a person benefited by a completed period of limitation be precluded from insisting upon that benefit. Courts of equity as well as courts of law, and the legislature as well, are powerless to take that right away, as indicated by this court in *Van Steenwyck v. Washburn*, 59 Wis. 483.

No further discussion of this subject seems necessary. The decisions cited to our attention in the briefs of counsel for appellant, to sustain the theory that a court of equity has power to relieve a widow from the effect of an election or failure to elect to take the provision made for her by law instead of the one made for her by her husband's will, because of mere ignorance or mistake on her part, cannot be followed. They are out of harmony with the doctrine of this and most courts. So rigorously has the latter doctrine, where fully recognized, been enforced, that, even in the face

of a statute expressly requiring the judge of the probate court to call the widow's attention to her right of election, it has been held that his failure to do so and her failure to elect through ignorance do not operate to extend the time given her by law to make her election. *Price v. Woodford*, 43 Mo. 247, 253; *Ewing v. Ewing*, 44 Mo. 23. In *Price v. Woodford* it was said:

"The law expressly declares that if the election is not made and the declaration properly acknowledged and filed, within twelve months from the granting of the letters, the right shall not exist. . . . This language is express and positive. . . . Because for convenience and as a favor to the widow the legislature directed that the court should cause notice to be given to her, it is not to be presumed that they intended to abrogate the maxim that every person is presumed to know the law."

The contention of respondents' counsel that the executors of the estate of Gov. Ludington had a legal and equitable right, if they saw fit, to remain passive for the year subsequent to the admission of the will to probate, conscious that by so doing the appellant, through her ignorance, would lose her widow's rights under the law, and that they and the Ludington children would be greatly enriched by such loss, must be sustained.

The foregoing conclusion goes as far in sustaining the contention of counsel for respondents, that the trial court erred in deciding that *Patton* and Van Schaick breached their duty to appellant in failing to inform her or put her in the way of informing herself as to what was the best course to pursue as regards her husband's estate, and in dealing with her to her disadvantage, as any of the authorities upon which they rely. All of such authorities speak of some passive failure, so to speak, to inform the widow, unaccompanied by any dealing with her to her disadvantage. The trial court did not decide that such conduct would be a breach of duty of an executor or trustee of an estate circumstanced as were

Mr. Van Schaick and *Mr. Patton*. The finding is based on the fact that they knowingly dealt with appellant and obtained, by purchase, her rights in the trust estate to her disadvantage, and to the advantage of those whom they stood for in common with her, but whose interests depended materially upon her conduct. There is the real mischief complained of. There is the circumstance of governing importance in this case upon which the finding of the learned judge of the superior court, that Van Schaick and *Patton* failed to perform their duty to appellant, is based.

The learned counsel for appellant who orally argued the case before this court freely conceded that if the executors and trustees had merely remained passive till appellant lost the interest in her husband's estate secured to her by law, through ignorance of her rights, they could hold the gains thereby obtained for the benefit of the heirs, free from any taint of wrong of sufficient significance that the court could take notice thereof, however much such conduct, under the circumstances, might be said to violate mere ethical rules of conduct; but it was insisted that when they undertook to induce appellant to bargain away to them her property, of which they were the trustees, for the benefit of the heirs and in a measure for their own benefit, they could no longer keep silent consistently with their duty to appellant, but were bound to make to her the fullest and amplest disclosure of all the facts within their knowledge, to her advantage to know, and not to acquire her property at all to her disadvantage. That was what the trial court decided. That is what counsel for respondents must successfully meet in order to demonstrate that the trial court was wrong in holding that the executors breached their duty to appellant in failing to correctly inform her of the value of the estate and of her legal rights therein and the manner of securing such rights if she so desired. In this the trial court followed the elementary principle that a trustee cannot bind his *cestui*

que trust irrevocably by contract made with him to his disadvantage, especially where there is any reasonable ground to say that the contracting parties were not on an equality in the transaction.

We have been unable to discover, either in principle or authority, or in anything suggested by the learned counsel for respondents, any satisfactory answer to that proposition as applied to this case. It is useless to argue that the relations of trustee and *cestui que trust*, to all intents and purposes, did not exist between appellant and Van Schaick and *Patton* at the time of the transaction in question, or that the relation of trust and confidence did not exist between them independently of the fact that they were the chosen of Gov. Ludington to administer his estate. It is useless to spend time considering the suggestion that appellant had her son by her side and that she herself was presumed to know the law, so far as the truth or fallacy of such suggestion affects the right of the executors to deal with her as they did. Appellant did not rely at all upon her son in any business affair. The executors were fully cognizant of that situation. They did not at any time, as the court found, regard him as of any importance or take him into consideration in any way in anything they did or failed to do. Both were members of the Ludington family by marriage. They knew that appellant was entirely unacquainted with business affairs. She had been a faithful wife and affectionate companion of Gov. Ludington for sixteen years, during which time she had done her part to maintain a home for him and his children, where all came or dwelt, as appears, with freedom and cordiality, evincing close family relations between them. She was left surrounded by those children, some of whom she had helped to rear. She had learned to know the executors, not only as members of her family, but as able business men. She trusted them implicitly, and it was most natural for her to do so. They knew that such

was her state of mind, or ought to have known it, and that what she did was simply to adopt their suggestions. Their acts were her acts. She did not even venture to suggest an opinion as to the provision made for her by the will when it was read, except by way of substantially echoing the suggestion made by Mr. Van Schaick. When they presented the offer to increase the provisions made for her by the will, she accepted it without argument or inquiry as to details. She signed every paper that was presented to her, in a way to indicate entire want of independent judgment. The executors and her attorney told her what she should do and she followed their directions with the most childlike confidence, evincing an utter want of independent judgment as to what was and what was not for her advantage. Notwithstanding the evidence of *Mr. Patton* that he supposed she was capable of looking after her own interests and was fully posted, the circumstances, which are in full accord with the findings of the court, all point the other way. They lead irresistibly to the conclusion that, from first to last, appellant did, without any adequate knowledge or appreciation whatever of her legal rights, whatever was suggested to her by Van Schaick and *Patton*. They could not reasonably have been unconscious of the fact that she was in their hands, a mere victim of their suggestions, ready to follow their every wish as if it were the very thing for her to do. To say, under those circumstances, independently of their relation to her as executors and trustees of the estate, that they did not owe her the duty of guarding her interests in the estate and of informing her fully in respect to her rights and how to protect them, before entering into a one-sided deal with her to acquire her property at an advantage to the heirs and to her disadvantage, would be to run counter to one of the most familiar principles of law governing the duty of trustees to their *cestui que trust*, and of persons towards others between whom exist such relations of trust

and confidence as to preclude such others from the exercise of independent judgment.

No rule is better established than that, if a trustee or a person standing in relations of trust and confidence to another deal with the *cestui que trust* or such other in respect to the subject of such trust, for his own benefit or that of others whom he represents, serving two persons at the same time, in form, when in contemplation of law he can serve but one loyally, the transaction cannot be upheld if called in question by the *cestui que trust*, unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, that the bargain was profitable to the beneficiary, and that he was fully informed in regard to the value of the property and the nature of his interest in it. Beach, Trusts, § 518; *Puzey v. Senier*, 9 Wis. 370; *Roller v. Spilmore*, 13 Wis. 29; *Barker v. Barker*, 14 Wis. 131; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Davis v. Dean*, 66 Wis. 100; *Creamer v. Ingalls*, 89 Wis. 112; *Disch v. Timm*, 101 Wis. 179; *Saunders v. Richard*, 35 Fla. 28; *Spencer's Appeal*, 80 Pa. St. 317; *Brown v. Cowell*, 116 Mass. 461; *Re Hodges' Estate*, 63 Vt. 661; *Cole v. Stokes*, 113 N. C. 270; *Mills v. Mills*, 63 Fed. Rep. 511; 1 Story, Eq. Jur. § 321. The policy of the law is to regard all transactions of a contract nature, between a trustee and his *cestui que trust*, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. If such a transaction be permitted to stand it is upon condition that the trustee satisfies the court, fully and completely, that the *cestui que trust* received a full equivalent for that which he parted with, and that the transaction was to his advantage rather than to his disadvantage. The burden of proof in such a case rests upon the trustee to

clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. The obligation of disclosure, and to protect the interests of the weak or trusting, is the same in one case as in the other.

"It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust* except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee." *Puzey v. Senier*, 9 Wis. 376.

The following illustrations of the result of abuse of confidential relations are in point:

"The rule is universal that, where a person to be benefited by a will or a voluntary deed has a controlling agency or influence in procuring its execution, it is regarded as a very suspicious circumstance, requiring the fullest explanation. Especially is this so where there exists a confidential relation, as . . . even that existing between a neighbor and near friend." *Disch v. Timm*, 101 Wis. 179.

'It would not be controverted that an executor or administrator is subject to all the responsibilities as regards beneficiaries under the will, as is the strict trustee to the *cestui que trust*.' *Tatum v. McLellan*, 50 Miss. 1.

"It is only when it is made to appear to the entire satisfaction of the court that the beneficiary had full knowledge of all the facts . . . and acted therein advisedly and without undue influence, that a contract of this character, between the trustee and the beneficiary (to the benefit of the former) will be sustained." 'Mere proof that the beneficiary was of sound mind and fully understood the nature and effect of the contract will not avail, in the absence of anything to show that he had an adequate knowledge of the matters covered by the contract.' *In re Hodges' Estate*, 63 Vt. 661.

The trustee must show, "by unimpeachable and convincing evidence that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly

free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge and information concerning the property possessed by himself or which he might, with reasonable diligence, have possessed." 2 Pomeroy, Eq. Jur. § 958.

"A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee," — that the trustee took no advantage whatever of his situation, and that he gave his *cestui que trust* all the information which he possessed. Lord ELDON in *Coles v. Trecothick*, 9 Ves. 247.

More need not be said to demonstrate the correctness of the decision of the trial court that Van Schaick and *Patton* wronged appellant in failing, under the circumstances, to disclose to her as fully as they reasonably could the nature and value of her interest in her husband's estate and the steps necessary to be taken by her to preserve that interest if she desired to do so. For the purposes of this case, whether the validity of the contract, whereby appellant parted with such interest, turns on mere relations of trust and confidence having existed between her and Van Schaick and *Patton* when the contract was made, or the legal relations of trustee and *cestui que trust* under the will, it is not necessary to inquire, nor to decide whether their conduct was characterized by a distinct purpose to defraud appellant. From the fact that the transaction in question was pecuniarily injurious to appellant and the circumstance of the existence of either of the relations mentioned, a presumption of fraud arises which must prevail, even if only the first relation mentioned existed, in the absence of evidence showing affirmatively that appellant dealt with a full understanding and appreciation of her rights, and must pre-

vail at her election in any event, since the relation of trustee and *cestui que trust* existed, and, unless some statute of limitations or act of appellant bars the way, result in restoring her to her rights the same as if the fraudulent transaction had never occurred, or accomplish such restoration in effect by charging the trustees under the will, who are in possession of the estate, as constructive trustees thereof for appellant, to the extent of the loss she would otherwise sustain.

"The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*, even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee; the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se*, to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection and the cost of which would be great. The law looks only to the facts of the relation and the purchase." Perry, Trusts, § 195.

We should say in passing that a trustee can no more deal with one for whom he stands, and to the disadvantage of that one for the benefit of himself as the representative of others, than he can for the benefit of himself absolutely. There can be, in the very nature of things, no difference between disability to deal in the one case and in the other.

It is conceded that appellant had but six years after the discovery of the fraud alleged to have been perpetrated upon her, within which to seek relief. Sec. 4222, Stats. 1898. Counsel for respondents challenge the finding of the trial court on this branch of the case, claiming that the evidence shows conclusively that appellant knew, or by the exercise of ordinary care might have known, of all the facts affecting her rights more than six years before the commencement of this action. It must be conceded that the statute of limitations commenced to run against appellant from the time she obtained knowledge of the fraud or might have obtained such knowledge by the exercise of reasonable diligence. We

do not deem it necessary to say more on this subject than that the trial court applied right rules of law to the evidence, and that the findings of fact are too well supported by such evidence to permit of their disturbance. It may be that, so far as relates to the mere value of the estate, appellant received sufficient information more than six years before the commencement of this action to start the statute of limitations running against her. But the evidence pretty clearly shows that the executors created, or cultivated, an impression in appellant's mind that she was bound by the will and was dependent upon the pleasure of the heirs for any provision that might be made for her other than that therein contained. Her legal rights were not considered with her or suggested to her, and, according to the testimony of *Mr. Patton*, they were not taken into consideration by himself, Van Schaick, and the heirs, or any of them. The executors approached appellant in the attitude of persons conferring a favor upon her, when they must have known that the result of success of their effort to contract with her would be so take from her upwards of three dollars for one. When they approached her with the proposition to increase her allowance out of the estate, they did so with the air of persons making a sacrifice for her benefit. She received them in that spirit and with the impression upon her mind that she was the beneficiary of the heirs. She accepted the offer made to her, and signed the instrument conveying her rights in the estate to the executors and trustees, while still under the delusion that she was a beneficiary of the heirs, when in fact the very opposite was the situation. That impression was firmly fixed in appellant's mind when she consummated the transaction by signing the written conveyance, by the attorney for the executors, who, she supposed and had good reason to suppose, was acting in her interests. She testified that she understood from him that she got the increase over the amount named in the will by the generosity of the heirs,

and that she was very fortunate in obtaining such a contract. Just what was said between them is in dispute, but the impression made upon appellant's mind by what was said is pretty clearly what she said it was. There can be no reasonable doubt, it seems from the evidence, but that the executors and trustees dealt with appellant knowing that they were giving her a very inadequate consideration for what they were receiving; that they were really obtaining the larger amount of appellant's property without consideration; that they were accomplishing that result while she was under the impression that she was being greatly benefited, and by the generosity of the heirs of the Ludington estate. There was the great wrong that was committed. Mere knowledge on the part of appellant of the value of the estate, subsequently obtained, did not remove from her mind or tend to remove the false impression that she was obliged to take what was given to her by the will and such additional amount as the heirs, in their generosity, might see fit to give to her out of the property, and that they had treated her generously; while the effect of the transaction was not the giving to her by them of any part of their property, but was the giving to them by her of the greater part of her property. It seems that the executors were largely if not wholly responsible for that false impression, and that it was controlling in appellant's mind in signing away her rights. The evidence does not show that such impression was removed from her mind, actually or constructively, till shortly before this action was commenced.

The fact that such false impression was a mistake of law does not militate against appellant's right to relief in equity. One of the most familiar of the many exceptions to the general rule that courts will not relieve against mistakes of law, is the one that such mistakes are relievable as readily as mistakes of fact where the transaction is between trustee and *cestui que trust* or persons standing in analogous

relations, when otherwise the general rule would enable one person, by reason of the trust reposed in him, to successfully perpetrate a fraud upon another. Story, Eq. Jur. (13th ed.), 144, 145; 2 Pomeroy, Eq. Jur. § 848. The real ground for relief in such cases is fraud, actual or constructive. *Tompkins v. Hollister*, 60 Mich. 470; *Voltz v. Voltz*, 75 Ala. 555; *Light v. Light*, 21 Pa. St. 407.

It is suggested that appellant forfeited her right to the aid of equity by delay in asserting her claim, independent of the statute of limitations. We are unable to sustain that view. Any mere delay, short of the statutory period for commencing an action in equity, does not bar the right involved. We are unable to discover any evidence in this case that defendants were prejudiced in any material particular by the failure of appellant to commence this action at the very earliest moment the evidence shows she was possessed of the requisite knowledge or was bound to be so possessed.

But it is said appellant did not restore to the estate what she received therefrom under the contract she seeks to avoid, and that such restoration was a condition precedent to her right to commence this action. The doctrine, that in case of a contract voidable upon the ground of fraud the injured party must totally rescind it and restore to the guilty party all that he received from him as a condition precedent to the right to recover what he parted with, is based on the rule that, by the injured party retaining what he received and suing to recover what he parted with thereafter, he occupies inconsistent and inequitable positions which the law will not permit. That is a general rule applicable to legal actions which proceed upon the theory of a precedent rescission. But even in such actions the rule is subject to some exceptions. *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183; *Gay v. D. M. Osborne & Co.* 102 Wis. 641. It does not apply in any arbitrary way at all to actions in equity for the

rescission of contracts. In such actions the plaintiff does not proceed upon the theory of a contract already avoided on the ground of fraud, but upon the theory that the jurisdiction of equity is needed to accomplish that end and to give such incidental relief as the plaintiff may be entitled to. It is sufficient in such a case to show by the complaint a willingness to do equity. The distinction must be kept in mind, in order to properly apply the rule under consideration, between an action in equity to rescind a contract and the rescission of the contract by the act of the party followed by an action at law for a recovery by such party of the money or property he parted with upon the faith of such contract. *Kirby v. Harrison*, 2 Ohio St. 326; 18 Ency. of Pl. & Pr. 837; *Thomas v. Beals*, 154 Mass. 51; *Shuee v. Shuee*, 100 Ind. 477; *Clapp v. Greenlee*, 100 Iowa, 586; *Maloy v. Berkin*, 11 Mont. 138. In *Thomas v. Beals*, the court, speaking by Mr. Justice HOLMES, said:

"There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not like an action at law, brought on the footing of a rescission previously completed. . . . The foundation of the bill is that the rescission is not complete, and it asks the aid of the court to make it so."

The distinction above referred to has not been definitely observed in this court, though our decisions, in the main, are in substantial harmony therewith. *Weed v. Page*, 7 Wis. 503; *Hendricks v. Goodrich*, 15 Wis. 679; *Hyslip v. French*, 52 Wis. 513; *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183; *Gay v. D. M. Osborne & Co.* 102 Wis. 641; and *Gates v. Raymond*, 106 Wis. 657,— were actions at law. In each, a total rescission of the contract and return of the money or property received thereunder, or such rescission and an offer to make such return, was held necessary, except where the contract was severable so that no injustice would be done the guilty party by the contract being considered severable and discharged in part by payments made thereon, and sub-

ject to rescission as to the balance, or where restoration of the property received by the plaintiff upon the contract was rendered impossible by the wrongful conduct of the defendant. In the latter class of cases it was said that the doctrine of rescission and restoration, as a condition precedent to an action at law, is based on equitable principles, and to be applied only so far as equity and good conscience require. *Grant v. Law*, 29 Wis. 99, was an action in equity for rescission. The judgment was reversed, not because there was a failure to rescind the contract and restore or offer to restore what the plaintiff received thereon before the action was commenced, but because the judgment did not provide for such rescission and restoration. The case is somewhat misleading from the fact that the supporting authorities cited are, in the main, decisions in actions at law. *Becker v. Trickel*, 80 Wis. 484, was an action in equity for rescission, and the court applied the doctrine that obtains in actions at law upon the theory, apparently, that rescission and restoration or offer to restore must precede an action in equity as well as an action at law. The only authority cited is *Hoffman v. King*, 70 Wis. 372, which was an action at law. It seems that the omission to observe the distinction between an action for rescission and an action based on rescission was a palpable mistake. In *Paetz v. Stoppleman*, 75 Wis. 510, the equitable doctrine was fully recognized. It was contended by counsel for the plaintiff that restoration in equity in case of fraud is not imperative, and the court approved that view. Among the authorities cited to the attention of the court was *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75, where this language was used:

"The defrauded party need not rescind and sue in an action at law for the consideration parted with upon the fraudulent contract. He may bring an action in equity to rescind the contract, and in that action may have full relief. Such an action does not proceed as upon a rescission, but proceeds for a rescission. In such a case it is sufficient

for the plaintiff to offer in his complaint to restore to the defendant what he received, and the rights of the parties can be fully regulated and protected in the judgment to be entered."

The great weight of authority is in accordance with the case last cited. It is sufficient in an action for rescission to show by the complaint a willingness to do equity, to submit to a complete rescission, so far as practicable, and to make the defendant good for what was received from him, in such manner as the court may direct. *Thackrah v. Haas*, 119 U. S. 499. The court having jurisdiction of the whole subject and the parties can do complete equity between them. It can compel full restoration to the defendant *in specie*, so far as justice requires, as a condition for rescission, and may deny or give costs, having regard to the necessity of resorting to litigation for the relief finally awarded.

This fully meets counsel's contention that restoration by appellant of what she had received under, and complete disaffirmance of, the contract in question, was a condition precedent to the maintenance of this action to avoid it. The complaint shows willingness to account for everything appellant has received, and in that it shows willingness to do equity, satisfying all the essentials of the right to invoke equity. If the complaint had not been so framed as to show such willingness, the defect could only have been reached by a demurrer for insufficiency on the particular ground that a cause of action in equity was not stated for the reason that plaintiff failed to show a willingness to do equity. *Taylor v. Fulks' Adm'r* (Ky.), 29 S. W. Rep. 349; *Ormsby v. Budd*, 72 Iowa, 80; *Newman v. Smith*, 77 Cal. 22.

A further contention is made that the judgment should be affirmed regardless of the ground upon which it was rendered, because the proper forum to consider the subject of the action was the probate court of Milwaukee county, and that the judgment of such court assigning the estate to the

trustees is conclusive as to the title thereto till reversed or opened in some proper proceeding. It is a sufficient answer to the first part of such contention, that the general equity jurisdiction of the superior court of Milwaukee county, under the statute creating it, is the same as that of the circuit court in respect to the subject of the settlement of estates, and that it is proper for such jurisdiction to be exercised when the circumstances are such that it can furnish a more complete and effective remedy than can be obtained in the probate court. *Meyer v. Garthwaite*, 92 Wis. 571; *In re Klein*, 95 Wis. 246; *Burnham v. Norton*, 100 Wis. 8. The second part of counsel's contention is sufficiently answered by the fact that this action does not question, collaterally or otherwise, the decree, so called, of the county court, but it is a proceeding against the parties to that decree to rescind a contract upon the ground of fraud, which stood in the way of appellant's asserting her rights in the proceedings in which the decree was entered. The judgment here sought, if obtained, will not vacate, modify, or affect the judgment of the county court, but will bear upon the parties to that judgment and prevent them from enjoying the fruits of their fraud. The jurisdiction of equity is ample for that purpose, as held in *Crowns v. Forest L. Co.* 102 Wis. 97.

It is further contended that the judgment of dismissal should be affirmed because the evidence shows that the case was fatally tainted with champerty. There is some support for that claim in the evidence of appellant, but it seems reasonably clear that the real contract between her and her attorney was embodied in a writing which was offered and received in evidence, and which is free from anything looking like champerty. It is unnecessary to state here the precise terms of that written contract. We are only required to determine whether it embodied the real agreement between her and her attorneys and is free from any cham-

pertous feature. If we were to consider the other features of the contract at all it would doubtless only confirm impressions gathered from all the other transactions in which appellant figured, the history of which appears in the record, that she customarily exercises little or no judgment in business matters and is easily led into making improvident contracts by any person having her confidence,— that she exercises very little or no independent judgment in such matters.

The further contention is made that the commencement of the actions at law, or either of them, against respondents for damages for the alleged fraud upon the theory of an existing contract, constituted an election to abide thereby, and a bar to the maintenance of this action to rescind. In that the familiar principle was invoked that if a person has inconsistent remedies the choice of one, generally, constitutes an irrevocable waiver of the others. *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Carroll v. Fethers*, 102 Wis. 436; *Fuller-Warren Co. v. Harter*, 110 Wis. 80. Counsel for appellant reply that the rule in this case operates the very reverse from what counsel for respondents contend for; that appellant first elected to rescind the contract by the commencement of this action, and that its pendency was pleadable in bar of the actions at law. Counsel for respondents seek to escape from that position by pointing to their argument that appellant did not rescind the contract before the commencement of this action, therefore that the first election was the commencement of an action at law for damages. The infirmity of that contention has been clearly shown. The commencement of an action in equity to obtain a rescission of a contract does not require a precedent rescission. It is just as effective an election as a rescission by act of the party followed by an action upon the theory that the original situation of the parties, so far as legal rights are concerned, has been thereby restored. The appli-

cation of the binding effect of a choice of inconsistent remedies contended for does not appear to have support in principle or authority.

What has been said covers all the contentions of respondents' counsel that the judgment appealed from should be affirmed, regardless of the points decided by the trial court, which are deemed of sufficient importance to require special mention. Those not referred to have been considered. The findings of fact, so far as adverse to respondents, must stand as verities in the case.

From appellant's standpoint the situation is the same, but it seems that, in addition to the facts found, the court should have decided in accordance with requests made by appellant's counsel, that she was prevented from discovering and seasonably asserting her legal rights in her husband's estate by the fraud practiced upon her by the executors and trustees. It seems that such must be the correct conclusion from the evidence and the facts found. As we have heretofore stated, the executors cultivated if they did not create in the mind of appellant the idea that she was dependent upon the favor of the heirs for anything she might obtain out of the estate in addition to the provision made for her in the will. The attorney for the trustees, because of his former position as adviser of Gov. Ludington, in approaching appellant in a manner naturally calculated to inspire confidence that he was guarding her interests, confirmed the impression in her mind that the paper he presented for her signature was at least not against her interests. She testified that he expressly stated that the bargain she had made and which was embodied in the paper was good for her and that she was fortunate in the matter. He denied making any such statement, and we may pass the matter over as not proved. Neverthless, the evidence shows, as the fact is according to the decision of the court, that when the paper was signed appellant supposed the attorney who presented it was rep-

resenting her interests as well as those of the Ludington children; that she was effectually imposed upon in that regard; that the attorney made no effort to disabuse her mind of such delusion and no effective effort to enable her to understand the instrument she was requested to sign, though, from her manner, it was apparent that she was completely submissive to whatever she was requested to do, evincing clearly that she was blindly trusting in those with whom she was dealing. The evidence further shows, as the court found, in effect, that all the parties concerned in obtaining the contract led appellant to believe that she was a fortunate recipient of a valuable favor from the heirs, when she was in fact the injured victim of misplaced confidence. The executors not only failed to inform her of her legal rights in breach of their duty to her, but they created the condition which naturally tended to prevent her from otherwise discovering such rights. Considering the fact that she knew nothing about business matters, was left entirely dependent for her future support upon what she might receive from her husband's estate, and was naturally disposed to follow the counsels of her husband's family and those who had stood near to him as advisers and business associates, as the executors and trustees must have known, no plan could have been adopted by deliberate scheming better calculated to prevent appellant from obtaining what was hers by law than the one that was resorted to.

We will say here in passing that we do not decide that there was such scheming or any wicked purpose to injure appellant in the transaction under consideration. We go so far only as to decide that appellant was misled in a manner to impose legal responsibility on the trustees the same, substantially, as if the injury inflicted was intended. Before she had time after her husband's funeral to reflect at all over her situation, or obtain needed rest to enable her to act considerately, on the very afternoon of the burial, the will

was read. That was immediately followed by a suggestion by Mr. Van Schaick that the provision for appellant was inadequate, which she echoed. He and *Patton* then proposed to look after her interests, as she understood it, and she submitted to their guidance. The same afternoon, without giving appellant any information of her legal rights or suggesting that she obtain any information, or giving her any time for that purpose, they approached her with the plan which involved the surrender of her statutory rights, pretending just as effectually by their attitude in the matter as they could have expressed in words, that it contemplated the bestowal upon her of so large a consideration for her interest in the estate as to make her really a beneficiary of the heirs. She unhesitatingly accepted the plan laid before her with that understanding, and thus, before the first setting of the sun after the funeral, without opportunity for rest or reflection or the exercise of judgment, in utter ignorance of her rights or the consequences of what she did, and with the most implicit confidence in the ability and disposition of the executors to do what was best for her, as they well knew or ought to have known, and without any attempt on their part to enlighten her or to do otherwise than cultivate the idea in her mind that the heirs were her benefactors, she agreed to a scheme fixing irrevocably her future and that of her family as to the property of the Ludington estate, to her and their injury, in a sum which of itself must be considered, at the least, a large fortune. That being accomplished, the executors further arranged that appellant should sign all papers necessary to fully consummate it, and that she should participate in the proceedings to probate the will by signing the petition therefor. They then caused an attorney to prepare and present papers for her signature, covering the agreement, who was best calculated to keep up the delusion under which appellant was laboring, that she was being treated with generous favor and with all the con-

sideration that could be expected by one surrounded by members of her own family deeply concerned for her interests. Such is the effect of the findings and the evidence. By the means detailed, appellant was effectually kept within the circle and under the influence of those interested and acting adversely to her, while they were pretending to guard her interests, till they not only acquired her rights in the estate but strongly fortified their position against danger of her becoming suspicious that she had been dealt with injuriously. Unhandsome as the picture is, from a moral standpoint, and much as we might wish to avoid thus exhibiting it, truth and justice require the portrayal, and charity has guided the hand that it might under rather than over shade, so far as judicial duty will permit.

How it can be said, under the circumstances which we have detailed, that the executors and trustees did not prevent appellant from discovering her legal rights, we are unable to understand. True, as the trial court found, appellant never intended or determined to elect to take the provision made for her by law; but if the reason thereof be found in the conduct of the executors and trustees, we must consider the situation the same as if such intent was formed. We cannot doubt, reasonably, but that, if such conduct had been proper appellant would have elected to stand upon her legal rights rather than to accept the offer made to her in the will or by the heirs. In determining that question we look at all the circumstances of the case in the light of reason and common experience. Appellant had always been surrounded by wealth and would naturally have rebelled against anything that threatened to materially change her situation in that regard had she appreciated the danger. She gave up the income from property valued at $80,000 for the privilege of becoming the wife of Gov. Ludington. She had two children by her former husband to whom she was warmly attached and whose comfort and prosperity she

was desirous to promote. There was no tie left to bind her to the Ludington family. She proposed separating herself from any close association with them and to take up her residence in the city of Chicago surrounded by or associated with the members of her own family. Such separation in fact did take place, and there has been no association of appellant with the Ludington children since about the time the contract in question was made. Appellant had every reason to desire to hold all that was legally hers for the benefit of herself and children, and no reason, as appears, to desire or consent to part with her property for the benefit of the Ludington heirs. We must assume that, had she appreciated her rights, she would have acted as people ordinarily act under the same or similar circumstances. We cannot escape the conclusion, reasonably, that had the executors, when they approached her to procure her interest in the estate, so informed her of the situation as to enable her to contrast the value of such interest, understandingly, with what they proposed to give her for it, the former being unquestionably more than double the value of the latter, she would unhesitatingly have chosen the former; and that they, as men of large experience in business affairs, must have known that when she accepted their proposition she did so in complete subservience to their will, not through the exercise of her own judgment; and that, instead of its being beneficial to her from a pecuniary standpoint, it was highly injurious to her.

In this we do not ignore, wholly, the statement made in the will that the provision there made for the appellant was satisfactory to her and was embodied in the will by agreement between her and the testator. If any conversation to that effect ever occurred between the parties, it is evident that it made no impression on appellant's mind which she retained, for upwards of three years which intervened between its occurrence and the reading of the will. Further,

it is evident that if such an occurrence took place she had then no appreciation of the value of her legal rights. In any event, such an agreement, if made, was not binding upon appellant, and is not entitled to any consideration except as explaining her conduct in entering into the contract to part with her legal rights for an inadequate consideration. It seems clear, under all the circumstances, that the reason why appellant did not form an intent to take her statutory rights is that she was kept in ignorance thereof by the conduct of Van Schaick and *Patton*, and that, had she formed such purpose, she would have seasonably executed it. In that view the trustees are chargeable with having fraudulently prevented appellant from making her election to take the provision made for her by law. The reasoning of the trial court that the executors wrongfully withheld from appellant the knowledge necessary for her to possess in order to pass intelligently upon the question of whether to elect to take under the statute or not, and yet that they may escape responsibility because no purpose to so take was formed, does not meet our approval. We must hold that such trustees are chargeable with having prevented all that would probably have occurred had their conduct been what it ought to have been, and that those things would have occurred which ordinarily take place under similar circumstances; that is, that appellant would not only have formed a purpose to take the provision made for her by law, but that she would have executed such purpose. Her failure to do so resulted in increasing the value of the trust estate now in the hands of the trustees, over what it otherwise would have been, to the extent of appellant's loss. Can they retain the fruits of their wrongdoing, or their *cestuis que trustent* profit thereby, or is the arm of equity long enough to undo that wrong by restoring appellant to her rights?

The foregoing inquiry indicates that appellant must go

without redress if respondents can successfully invoke the statute limiting the time for her to renounce the provisions made for her in the will. It seems manifest that they cannot do that unless the court violates the elementary principles of estoppel, that no man can profit by his own wrong, *Nullus commodum capere potest de injuria sua propria* (Beach, Trusts, § 220); and that other principle that, "if a person be fraudulently prevented from doing an act, it will be considered in equity as if that act had been done." Id. § 221; *Smart v. Waterhose*, 10 Yerg. 94, 103, 104; *Brook v. Chappell*, 34 Wis. 405; *Post v. Campbell*, 110 Wis. 378; *Morey v. Herrick*, 18 Pa. St. 123; *Thompson v. Marley*, 102 Mich. 476; *Curdy v. Berton*, 79 Cal. 420; *Thynn v. Thynn*, 1 Vern. 296; *Middleton v. Middleton*, 1 Jac. & W. 94.

In *Smart v. Waterhose*, which is cited by appellant's counsel, such principles were applied to a case substantially like the one before us, the only difference being that the widow was prevented by fraud from making her election after she had formed a purpose to do so. But as we have held that if a person fraudulently prevents the formation of a purpose to do an act which, if once formed, would probably be executed, he is in effect guilty of fraudulently preventing the execution of such purpose, the cases must be considered as in every respect similar. As in the case at bar, the actors in the commission of the fraud in the cited case were the executors. The widow, the same as here, reposed implicit confidence in such executors. They took advantage of her condition of mind in that regard, and of her ignorance, to make with her an unconscionable bargain whereby she omitted, for the time provided by law, to elect to take the provision out of her husband's estate secured to her by statute. The court summed up the situation and the law governing it thus:

"This woman has been prevented by the fraud of those who were interested in the estate from entering her dissent.

She was about to avail herself of the provisions of an act made for her benefit, and the defendants interposed, and by fraud prevented her, and now they set up the consequence of this fraudulent act as a bar to the right she would have obtained; this we think they cannot do. It is a rule laid down and acted on in many cases that where an act has been prevented from being done by fraud, equity will consider it exactly as if it had been done."

That doctrine is fully sustained in the cases upon which the learned counsel for respondents rely to support the judgment appealed from. In *Stephens v. Gibbes*, 14 Fla. 331, 357, relief was denied upon the ground that no fraud was shown, the court saying:

"The statute gives to the widow this time to inform herself of all the circumstances necessary to the exercise of a judicious and discriminating judgment, and if she neglects thus to do, she cannot be relieved of its consequences, *unless her case is brought within that class of cases where a court of equity extends its corrective influence on account of fraud, imposition, misrepresentation, or mistake.*"

The same doctrine was declared in *Akin v. Kellogg*, 119 N. Y. 441, upon which respondents' counsel lean with confidence. That case involved a statute precisely like the one in question, and would be as decisive in favor of respondents as any judicial authority of a sister state could be, were it not that the decision was based on the absence of any satisfactory showing of fraud, it being stated, in effect, that, if such absent element were present, the injured party would have been entitled to relief. In the same line is *Fosher v. Guilliams*, 120 Ind. 172, 175, where the court said:

"If, through any fraud or contrivance of those interested in the estate, the widow was prevented from making an election, a court of equity might find means of affording relief against those who perpetrated the fraud."

So it will be seen that the authorities upon which both sides rely, when applied to the facts as we have found them to be, support the claim of appellant's counsel that the judgment appealed from is erroneous and that a decree should

have been entered granting to appellant such relief as will, so far as practicable, wipe out the effect of the fraud of which she was made the victim. It does not seem that further reference to authorities on the subject is necessary. The governing legal principles are substantially without dispute. Appellant's counsel base her right to recover on the claim that she was prevented from taking the necessary steps to secure the provision out of her husband's estate made for her by law, by the fraud of the executors and trustees, who, in person or by representation, are now before the court and are in possession of the property of the estate. Respondents' counsel claim that the judgment should be affirmed because, as they insist, neither the evidence nor the findings show that the executors and trustees were guilty of any fraud which operated to the injury of appellant. The questions of fact involved in the respective claims mentioned being clearly established in appellant's favor, by well-settled principles of equity jurisprudence the trustees now in possession of the property under the will are chargeable as trustees for appellant by construction, of the property which came into the trust under the will, to the extent which she would have been entitled to had she elected, in due form of law, to take the provision made for her by statute. The trial court grievously erred in holding that one person may extinguish the property rights of another for the benefit of himself or those whom he represents, by wrongfully taking advantage of the weakness or ignorance of such other, and be heard successfully to plead in a court where conscience reigns supreme, "Thou canst not say I did it;" that a person can successfully plead, in such a court, nonperformance of such a condition where he himself wrongfully prevented such performance; and that a person may wrongfully prevent the formation of a purpose to do an act and stand guiltless in equity of having prevented the act itself, notwithstanding the doing of the

act required a precedent purpose in that regard, which in all reasonable probability would have been executed had the purpose been formed. Our system of jurisprudence for remedying wrongs has no such weakness. The arm of equity, after the development and exercise of centuries, ought to be and is long enough and powerful enough to remedy all substantial wrongs where legal remedies fail, if it be seasonably invoked. No man can take advantage, wrongfully, of the weakness of infancy or old age, of ignorance, or of trust and confidence, and successfully challenge a court of conscience to remedy the mischief, if it be invoked as before indicated. It will in such circumstances stay the guilty hand of him who seeks to put forward a completed statutory limitation period upon the assertion of a right, or nonperformance of a condition precedent or subsequent, which he wrongfully caused to occur for the accomplishment of the very wrong sought to be redressed, and thus reach the ends of justice between the parties.

The result of the foregoing is that we must hold that the wrongful conduct of the executors and trustees of the Ludington estate was the proximate cause of appellant's losing her statutory rights in her husband's estate, hence she must have that part thereof which came into the trust as personal property which she would have secured by an election to take under the statute, or have its equivalent, and further have the same as of the time she would have obtained it in the regular course of the settlement of the estate. If more than legal interest has been obtained by the trustees for the use of the property in the meantime, she is entitled to the benefit thereof. She must be made good for all allowances to which she would have been entitled out of the estate for her support or otherwise had she made her election as indicated, and have the same as of the time such allowances would have come to her possession in the regular course of the administration of the estate. She must also have all the

other benefits that would have come to her in case of such election, including her proper share of the rents and profits of the real estate of which her husband died seised, including her share of the rent of the Pabst corner, so called, treating such rent as profit issuing out of real estate in which she is entitled to share on the basis of dower. Where a married woman joins with her husband in a lease and he dies during the term, she is entitled to be endowed of the rent. *Herbert v. Wren*, 7 Cranch, 370; *Boyd v. Hunter*, 44 Ala. 705; 1 Hilliard, Real Prop. (4th ed.), 176, § 12. She must account for all of the sums of money she has received, and as of the time of the receipt thereof, and she must restore to the estate the Kenwood home, in the state of Illinois, which she now occupies, and account for the use thereof. In such accounting the trustees should be allowed their reasonable expenses and charges for caring for the property upon substantially the same basis as if they had administered the same for appellant as trustees of an express trust. The heirs must make restitution of all moneys distributed to them which rightfully belong to appellant, so far as necessary to enable her to obtain the full relief to which she is entitled, and their interests in the estate, now in the hands of the trustees, must stand charged with that obligation. *Huguenin v. Baseley*, 14 Ves. 273; *Bridgeman v. Green*, Wilm. Op. 58, 65; *Luttrell v. Olmius*, cited in 11 Ves. 638. It is a very old principle that he who obtains property of another without consideration, as by gift, which came to the possession of such other by fraud, cannot hold the same as against the rightful owner thereof. On this, *Bridgeman v. Green*, *supra*, decided in 1757, is found often cited and applied, where Lord WILMOT said, speaking of distributees of property obtained by the distributor by fraud:

"Whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his

relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt, polluted channel, the obligation of restitution will follow it."

The same principle applies in case property is obtained by fraud in any other way than by mere gift, and then distributed to others for whom the person procuring it acted. The principal cannot enjoy the fruits of the fraud of his agent.

The accounting, which a final disposition of the case in accordance with the foregoing requires, involves many details not covered clearly if at all by either the findings or the evidence so that this court can pronounce final judgment. Therefore, the judgment appealed from must be reversed and the cause remanded for further proceedings in accordance with this opinion, such further evidence to be taken as may be necessary to enable the trial court to determine definitely the rights of the parties in accordance with the principles here laid down for the government of the case. The judgment for costs in this court should be paid out of the estate.

By the Court.— So ordered.

DODGE, J. After most anxious consideration, I find myself unable to agree with the decision of this case. I do not differ from my brethren as to the duty of *uberrima fides* owed by the trustees to the plaintiff, nor as to her right to have rescinded any unfair contract or release of rights which she has made in ignorance of her rights, albeit without any affirmative deceit or intentional imposition by the trustees, but I fail to discover any such result as to justify the interposition of a court of equity. To briefly summarize the transaction: It is apparent that all parties met upon the supposition and understanding that the plaintiff expected and purposed to receive whatever might come to her of her

husband's estate as donation from him consonantly with the somewhat elaborate scheme of his will. The will itself declared her assent thereto, and, in the light of that declaration, it is obvious none of the parties contemplated any different attitude. When, therefore, plaintiff suggested that the testamentary provision was inadequate for her comfortable support, since she had determined to live in Kenwood and not to occupy the homestead, I think it entirely plain that the other beneficiaries met her in a spirit of generosity and regard for her welfare, and offered to increase the testamentary allowance to her, with no thought of depriving her of other rights. The modification whereby, wholly for her convenience, she was to take the Kenwood house in lieu of the Milwaukee homestead, made necessary some form of release of her former rights. This, clearly, was the arrangement as all parties understood it; and, had the written instrument signed by her correctly expressed it, no one could have suggested that any advantage had been gained over her, but, on the contrary, all must have conceded that she was recipient of generous donation. Such an instrument would merely have declared her release of all sums and property given her by the will, in consideration of the sums agreed to be paid her. So far as the written document in fact prepared for her signature exceeded this, it departed from the understanding reached, and I should unhesitatingly advocate its rescission if by such excess she were deprived of any rights. I cannot discover that she has been. She never had any rights in her husband's estate, save such as the will gave her. True, upon the performance of a certain condition she might acquire other and different rights, but that condition has never been performed. To assume that it would have been but for defendants' fraud seems to me not only the merest conjecture, but conjecture contrary to all the probabilities. The fraud consists not in increasing her share under the will, but in taking from her a re-

lease of statutory allowances inconsistent with the scheme of the will. I cannot doubt that the former, and not the latter, is responsible for plaintiff's satisfaction and quiescence, not only during the year allowed her for election, but for many subsequent years. Plaintiff's own testimony makes entirely apparent that nothing contained in that writing — no agreement of release on her part — deterred her from investigation or enforcement of her rights, nor could it. Had she within the statutory year elected to take by law, there can hardly be doubt that she would have been sustained in so doing, and her release of her statutory rights would have been ignored. The plaintiff does not pretend that she ever within the year conceived the desire to elect against the will. She therefore could not have been deterred from so doing by her written contract. On the contrary, the fact that plaintiff received abundant provision for her comfortable support from the bounty of her husband, supplemented by the generosity of his children, was an entirely adequate reason for her mental state of satisfaction. In that there was nothing of fraud or overreaching, under even the highest ethical or legal requirements. In brief, I think it established without controversy that plaintiff's omission to exercise her election was due to a situation involving no fraud on the part of defendants, and that, while they may be chargeable with legal fraud in the act of their attorney in obtaining plaintiff's written release, such fraud in no wise caused the result of which she complains.

BARDEEN, J. I concur in the foregoing opinion of Mr. Justice DODGE.

A motion for a rehearing was denied September 24, 1901.

JOHNSON, Respondent, vs. BUFFALO COUNTY, Appellant.

September 3—September 24, 1901.

Counties: Bridges: Aid to town: Contracts: Power of commissioners.

Under sec. 1319, Stats. 1898 (providing that in certain cases, upon petition of the town board, the county board shall appropriate one half of the cost of the construction of a bridge and shall designate two of its members as its commissioners to co-operate with the town board, and that such board and said commissioners shall have full charge and authority to act in the letting, inspection, and acceptance of the work), neither the commissioners alone nor the commissioners and the town board together have any authority to bind the county by a contract for the construction of a bridge.

APPEAL from a judgment of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *M. L. Fugina* and *Webber & Lees*, and oral argument by *Mr. Fugina* and *Mr. Edward Lees.*

For the respondent there was a brief by *C. W. Gilman* and *Charles J. Traxler*, and oral argument by *Mr. Traxler.*

CASSODAY, C. J. Some time prior to December 2, 1898, the town board of the town of Modena filed its petition with the county board of the defendant county for aid in the construction of the bridge therein described within that town, as prescribed in sec. 1319, Stats. 1898. Thereupon the county board designated two of its members to co-operate with the town board, as prescribed in that section. On December 2, 1898, an agreement in writing was made, or purported to be made, by and between the plaintiff as party of the first part and "the town of Modena and the county of *Buffalo*, by their joint committee," as party of the second part, wherein the plaintiff "agreed to furnish all material, and to construct and complete, ready for travel," the bridge described, on or before April 1, 1899, in consideration of which

the party of the second part therein in form agreed to pay to the plaintiff $845 on the completion of the structure. That agreement was signed by the plaintiff and the town board, and also by the commissioners so appointed by the county board. On March 21, 1899, such commissioners of the county board made and filed with the county clerk their report in writing that such bridge had been built and completed according to the contract, and to their entire satisfaction, and that $422.50 — being one half of the contract price — was then due to the plaintiff from the county, and recommended its payment. The town paid the plaintiff one half of such contract price as its share thereof.

On or about March 28, 1899, the county treasurer, on the order of the chairman of the county board and the county clerk, bought a draft from the Exchange Bank of Alma, Wisconsin, on the Batavian Bank of La Crosse, for $422.50, and sent the same by mail to the plaintiff, at Minneapolis, where he resided. The plaintiff testified to the effect that he was at different places in South Dakota on April 2, 1898, and until April 6, 1898, and that he did not receive the draft until April 8, 1898, although his letter written on that day to the county treasurer states that he received it some days before. On that day the plaintiff deposited the draft to his credit in a Minneapolis bank, and that bank sent it to a Milwaukee bank for collection, and it was finally presented to the La Crosse bank for payment April 11, 1899, when payment was refused for want of sufficient funds to the credit of the Alma bank; and it is undisputed that the La Crosse bank did not have sufficient funds to the credit of the Alma bank to pay such draft at any time from March 28, 1899, to April 11, 1899, inclusive, except from March 31, 1899, to April 6, 1899, inclusive.

The plaintiff, having failed to realize on the draft, presented his verified claim for the amount thereof, with interest, to the county board, November 14, 1899, claiming the

the same as "due on joint contract between" himself "and *Buffalo County* and the town of Modena." The county board wholly disallowed such claim, and thereupon, and on January 8, 1900, the plaintiff appealed from such disallowance to the circuit court. The defendant answered to the effect that the draft so sent was received by the plaintiff and accepted by him in full payment of said account, but otherwise denied each and every allegation of the complaint.

A trial being had, the jury returned a special verdict to the effect that the plaintiff first received the draft April 3, 1899. Thereupon the plaintiff moved upon the minutes of the court to set aside the verdict, and for a new trial, and also for judgment in his favor upon such verdict and the records and evidence in the case. At the same time the defendant moved the court for judgment in its favor upon the special verdict so rendered. Subsequently the court denied the defendant's motion, and ordered judgment in favor of the plaintiff upon his motion therefor, which was accordingly entered. From that judgment the defendant brings this appeal.

While it is conceded that the commissioners were properly appointed by the county board to co-operate with the town board, as prescribed in sec. 1319, Stats. 1898, and that the plaintiff had completed the bridge according to such agreement in writing, and that the town had paid one half of the contract price, yet it is contended that such agreement in writing was not binding upon the county for want of authority in the commissioners to make the same. The statute provides that "the supervisors of the several towns shall have the care and supervision of all highways and bridges therein, except as is otherwise provided by law." Sec. 1223. The chapter in which that section is found prescribes the duties of town supervisors in respect to highways and bridges. Ch. 52. So the supervisors of any town are by statute authorized to levy a tax, not exceeding a sum mentioned,

for the building of bridges. Sec. 1318. The statutes also prescribe the manner of obtaining aid from the county for the making and repairing of highways and the making of permanent improvements thereon. Secs. 1299*g*, 1304*a*–1309, 1319. This last section provides that "whenever any town board shall file its petition with the proper county board [as in the case at bar] the said county board shall appropriate the other half of such cost and cause such sum to be levied upon the taxable property of the county as will, with the amount provided by said town, be sufficient to defray the expense of erecting or repairing each bridge so petitioned for, and such money, when collected, shall be paid out on the order of the chairman of the county board and county clerk whenever the said town shall notify them that the work has been completed and accepted." Sec. 1319, Stats. 1898.

If the county is liable at all in this action, it is by virtue of the provision of the statute just quoted. That provision certainly does not purport to give a right of action in favor of the party constructing the bridge against the county. It simply imposes upon the county board the duty of appropriating the "other half of such cost," and to "cause such sum to be levied upon the taxable property of the county," and to collect the same, and to pay it out as prescribed, when notified by the town "that the work has been completed and accepted." Such aid of the county can only be invoked by the petition of the town board, and the response of the county is to be made to the town board. Certainly, the two commissioners designated by the county board are not expressly authorized to contract with such bridge builder in the name of the county, much less in the name of the county and town jointly, which would be an attempt to bind the county to pay the whole contract price. True, the section relied upon requires the commissioners to "co-operate" with the town board, and provides that such

board and commissioners "shall have full charge and authority to act in the letting, inspecting, and acceptance of the work." The county does not deny the authority of the commissioners to co-operate with the town board in letting the work, nor the authority of the board and commissioners to inspect and accept the work when completed. In other words, the county does not deny that it is in duty bound to aid the town, in the manner prescribed, to the extent of one half of the cost of the bridge; but it insists that neither the commissioners nor the commissioners and the town board together had any authority to make a binding contract between it and the bridge builder, like the one in question. It insists, moreover, that it could only be bound to make an appropriation, and levy and collect the tax as prescribed, and, when collected, pay over the amount on the requirement of the town whenever the work should be completed and accepted by the commissioners and the town board. "The powers of a county as a body corporate can only be exercised by the county board thereof, or in pursuance of a resolution or ordinance by them adopted." Sec. 652, Stats. 1898. Here the county is authorized to aid the town in the manner prescribed, and in no other manner. We must hold that the defendant is not liable to the plaintiff on the contract of December 2, 1898.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to grant the motion of the defendant and enter judgment in favor of the defendant and against the plaintiff dismissing the action, and for further proceedings according to law.

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ST. CROIX COUNTY, Respondent, vs. WEBSTER, Appellant.

September 3 — September 24, 1901.

Public officers: Compensation: Unauthorized allowance: Recovery: Clerk of circuit court: Fees: Burden of showing illegality: Estoppel.

1. If a public officer receives from a municipal corporation compensation in addition to that authorized by law for services within the scope of his official duties or which are voluntarily performed as such officer, he obtains no title thereto and the same may be recovered by the corporation in an action for money had and received.
2. Sec. 747, R. S. 1878, provides that clerks of the circuit courts shall be entitled to the fees therein specified and *no more*, but that whenever the county board may think the compensation therein provided insufficient they may order an additional sum to be paid out of the county treasury. *Held*, that payments by the county to the clerk in addition to the statutory fees cannot be justified under the latter provision, where no claim was made that the compensation allowed by statute was insufficient and the county board did not consider that question but merely allowed the unauthorized charges or items in the fee bills presented by the clerk.
3. The provision of sec. 747, R. S. 1878, which allows the clerk certain fees "for making copies of any judgment, order, report or other paper or record" does not authorize him to make any charge for writing the names of eligible jurors, cutting them apart, and putting them in the box ready for the drawing of the panel.
4. Neither the provision above quoted, nor that which allows a fee "for recording any paper, order, judgment or report when required," authorizes any charge for transcribing the court minutes into a book.
5. Under sec. 747, R. S. 1878, the clerk of the circuit court is entitled to $1 and no more for drawing the panel of jurors, and to the same amount for admitting to citizenship, including certificate.
6. Under sec. 4060, R. S. 1878, witnesses in criminal cases are to make and present to the clerk their affidavits of attendance and travel, and if the clerk administers the oath to such an affidavit it is a service performed for the witness and not for the county; but the fees for certificates of attendance, etc., issued to such witnesses are properly chargeable to the county.
7. The clerk's fees for certificates of attendance and mileage issued to jurors and court officers under secs. 2560 and 733, R. S. 1878, are a proper charge against the county.

8. For the certified transcript of the list of certificates issued to jurors, etc., transmitted to the county board pursuant to subd. 8, sec. 742, R. S. 1878, the clerk is entitled to compensation from the county, under the clause of sec. 747 which provides a fee for making a copy of "a judgment, order, report or other paper or record."

9. In an action by a county to recover the amount of fees alleged to have been unlawfully paid to the clerk of the circuit court, the burden is upon the county to show by affirmative evidence the illegality of any items complained of.

10. In an action at law by a county to recover the amount of unauthorized charges which had been allowed by the county board on the fee bills of the clerk of the circuit court and paid to such clerk, there is no estoppel barring a recovery where the clerk neither performed any service nor changed his position by reason of any action taken by the county, but simply performed his duties as required by law.

APPEAL from a judgment of the circuit court for St. Croix county: W. C. SILVERTHORN, Judge. *Modified and affirmed.*

This is an action by *St. Croix County* to recover back from the defendant alleged illegal fees which had theretofore been paid by the county to the defendant in his capacity as clerk of the circuit court. It appears from the evidence that the defendant was clerk of the circuit court of *St. Croix County* for six years, being from 1891 to 1896, inclusive; that during that time he rendered annual bills to the county board for services claimed to have been performed by him, as such clerk, for and on behalf of the county, which bills were duly audited and paid; and it is now claimed that a considerable number of items in each of said bills were unauthorized and in excess of the fees allowed by statute to the clerk of the circuit court, and this action was brought to recover back such unauthorized fees. The complaint contained six counts, being one for each year. A general demurrer was interposed to the complaint, and a separate demurrer to each count thereof, on the grounds that the court had no jurisdiction and that it did not state facts sufficient to constitute a cause of action. The first count was

also demurred to on the ground that the same was barred by the statute of limitations. All the demurrers were overruled, except the demurrer to the first count of the complaint, which was sustained on the ground that the same was barred by the statute of limitations.

The defendant having answered, the case was tried before the court, jury trial having been waived. The court found generally in favor of the plaintiff on all the items claimed to be recovered by the county in the last five counts of the complaint, except as to an item for drawing certain reports of a committee of the county board, and upon such findings judgment was entered in favor of the plaintiff and against the defendant for the sum of $1,250.55 and costs. From this judgment the defendant appeals.

For the appellant there was a brief by *Baker & Haven*, and oral argument by *Spencer Haven*. They contended, *inter alia*, that when a claim is regularly presented to the county board for allowance or disallowance, the board in allowing or disallowing it, or any part thereof, acts judicially and its action thereon is conclusive upon the parties until reversed or set aside by a proper proceeding, appeal or *certiorari*, for that purpose. The conclusiveness of the judgment or allowance of the claim by the county board can be attacked collaterally only upon the ground of fraud or absolute want of jurisdiction. *Heald v. Polk Co.* 46 Neb. 28; *Ragoss v. Cuming Co.* 36 Neb. 375, 46 Neb. 36; *Cuming Co. v. Thiele*, 48 Neb. 888; *State ex rel. Franklin Co. v. Vincent*, 46 Neb. 408; *Sioux Co. v. Jameson*, 43 Neb. 265; *State ex rel. Ensey v. Churchill*, 37 Neb. 702; *Dixon Co. v. Barnes*, 13 Neb. 294; *Wayne Co. v. Randall*, 43 Mich. 137; *Advertiser & T. Co. v. Detroit*, 43 Mich. 116; *McArthur v. Luce*, 43 Mich. 435; *Regents of University of Mich. v. Rose*, 45 Mich. 284; *Perry v. Cheboygan*, 55 Mich. 250; *El Dorado Co. v. Elstner*, 18 Cal. 144, 149; *Tilden v. Sacramento Co.* 41 Cal. 68; *Colusa Co. v. De Jarnett*, 55 Cal. 373, 375; *Placer Co.*

v. *Campbell*, 11 Pac. Rep. 602; *Cox v. New York*, 103 N. Y. 519, 527; *People ex rel. Case v. Collins*, 19 Wend. 56, 58, 64; *People ex rel. Board of Health v. Dutchess*, 9 Wend. 508; *Sup'rs of Onondaga Co. v. Briggs*, 2 Denio, 26, 31–41; *People ex rel. Cent. Nat. Bank v. Fitzgerald*, 54 How. Pr. 1; *Martin v. Greene Co.* 29 N. Y. 645; *Chenango v. Birdsall*, 4 Wend. 460; *Comm'rs of Scioto v. Gherky*, Wright, 494; *Brewer v. Boston, C. & F. R. Co.* 113 Mass. 56; *Board of Comm'rs of Warren Co. v. Gregory*, 42 Ind. 32; Stats. 1898, sec. 699, subd. 1; Id. secs. 676, 682–685; *Stringham v. Winnebago Co.* 24 Wis. 594; *Outagamie Co. v. Greenville*, 77 Wis. 165, 171; *Sharp v. Mauston*, 92 Wis. 629; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 258, 262.

James A. Frear, for the respondent.

WINSLOW, J. Whatever uncertainty may exist in the decisions of other courts upon the main question presented in this action, there is no uncertainty as to the position of this court, and that position may be briefly stated as follows: A public officer takes his office *cum onere*, and all services performed by him within the scope of his official duties, or which are voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. A municipal corporation has no jurisdiction to allow to such officer additional compensation not authorized by law for the performance of such services, and if such allowance be in fact made it is a void act. If such officer receives such additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action at law. If the proper corporate officers in such case refuse or neglect to bring such action, an equitable action may be successfully maintained by any taxpayer to recover such moneys for the benefit of the corporation, if the action be a timely one and there are no equitable considerations

which will operate as an estoppel. *Kewaunee Co. v. Knipfer*, 37 Wis. 496; *Frederick v. Douglas Co.* 96 Wis. 411; *Quaw v. Paff*, 98 Wis. 586; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 258; *Webster v. Douglas Co.* 102 Wis. 181. When the action is brought by the corporation itself, there can be no doubt that the proper form thereof is that of an action for money had and received, as is the form of the present action. These general propositions not being doubtful, we may proceed at once to the consideration of the facts of the present case.

The defendant was clerk of the circuit court of *St. Croix County* from 1891 to 1896, inclusive, and performed the duties of the office, rendering bills against the county for alleged official services annually, which bills were allowed and paid as rendered, with the exception that in 1896 a deduction of $24 was made from the bill as presented. These bills were itemized, and it is claimed in this action, and was found by the court, that a considerable number of the items were improper and illegal charges which the county had no legal authority to allow or pay.

Under our statute the clerk of the circuit court is not a salaried officer, but receives his compensation in fees. The statute says (R. S. 1878, sec. 747): "The clerks of the several circuit courts shall be entitled to the following fees and *no more*, viz." Then follows a long list of services, with a specified fee for each service, and at the close of the section appears the following provision: "Whenever the county board may think the compensation herein provided insufficient, they may order an additional sum to be paid out of the county treasury." With regard to this latter provision, under which certain of the illegal allowances are attempted to be justified in the present case, it may as well be said at the outset that the county board never acted or attempted to act under it. They simply allowed the items of the bills as presented. No claim was ever made by the defendant

that the compensation allowed by statute was insufficient, and hence there has been no consideration of that question by the county board. It is absolutely certain, therefore, that this provision cannot be used to justify any charge exceeding the statutory fees, because there was no finding by the county board that the statutory compensation was insufficient, and no attempt nor intention shown to make any additional compensation.

Proceeding now to the items for which judgment has been rendered against the defendant in the present action, we shall consider them in detail:

The defendant charged and was allowed by the county board $3 for each quarterly statement made by him to the secretary of state under sec. 743, R. S. 1878, showing the actions commenced in the circuit court during the preceding quarter, making in all $60. He also charged and was allowed $35 for remodeling the clerk's office by putting in new file cases purchased by the county, and sorting out the old papers and filing them away in order in the new cases. He also charged and received $6 for writing letters to thirty-six jurymen, notifying them when to attend, and afterwards writing a second set of letters notifying them not to come; both sets of letters having been written by order of the court. As to all of these items it is frankly conceded by the defendant's counsel that there is no provision of the statute prescribing a fee for such services, but it is claimed that their allowance may be justified under the additional compensation clause. Under the principles already laid down in this opinion, there can be no allowance under that clause, because the board never acted under it. All of these items, therefore, were properly recoverable in this action.

The defendant charged and was allowed $3 for each jury term for writing the names of eligible jurors, cutting them apart, and putting them in the ballot box ready for the drawing of the panel of jurors, amounting to $30 in all. This

is attempted to be justified only under that clause of sec. 747, *supra*, which allows the clerk ten cents per folio for "making copies of any judgment, order, report or other paper or record." It is sufficient to say with regard to this claim that we think it clear that the clause quoted does not cover the work done.

The next item is a charge for transcribing the court minutes, amounting to $428. It appears that the defendant kept the minutes of the proceedings of court when in session in pencil, and after the adjournment of court drew them off from this pencil memorandum into a permanent book with pen and ink, and this charge is for that service. The defendant attempts to justify this charge under the clause quoted above with regard to the last preceding item, and under another clause of sec. 747 which allows ten cents per folio "for recording any paper, order, judgment or report when required." It is plain that neither clause covers the charge. The statute requires him to keep a minute book showing all the proceedings in court (R. S. 1878, sec. 742), but gives him no fee therefor. It is one of the duties which he assumes in consideration of the compensation fixed for other services, and he is not entitled to charge for it.

The next item is a charge of $215.50 for oaths administered to witnesses in criminal cases to verify their mileage and *per diem* fees. This is supposed to be justified by that clause of sec. 747 which provides a fee of twenty-five cents for administering an oath, and by sec. 4060, R. S. 1878, which provides that the clerk shall issue to each witness in a criminal case a certificate of attendance, travel, and compensation due him, *upon proof by affidavit* of such attendance and travel. In the present case the clerk administered the oaths to the affidavits of attendance, and claims that the county should pay him the statutory fee for each oath. The claim is not tenable. Under sec. 4060 it is manifest that the witness himself is to make and present his affidavit to the

clerk. If the clerk administers the oath, it is a service performed for the witness, and not for the county.

The statute allows the clerk $1 for drawing a panel of jurors for a term, but the defendant charged $3 for each panel drawn, making an excess of $16, which has been paid him. This cannot be justified in any way, and the trial court rightly held that the defendant was liable for it. The same remarks apply to items aggregating $37 for admitting jurymen to citizenship. It seems that when jurors were found in attendance who had not obtained their second papers the court was in the habit of directing that they obtain their second papers, in order that they might act as jurors, and that in each such case the defendant charged and was allowed $1.50 for his services and certificate. The statute (sec. 747) gives him a fee of $1 on an admission to citizenship, including the certificate. The court has disallowed the sum of fifty cents in each case, which action is manifestly right. Whether the entire charge should not have been disallowed may be a serious question, but it is not before us now.

There are, however, a number of items for which judgment has been rendered against the defendant which we think were properly allowed by the county board, and for which there can be no recovery. These are:

First. The item of $84.25 for certificates issued to witnesses in criminal cases, certifying to their attendance and mileage, under sec. 4060, R. S. 1878. Sec. 747 provides that the clerk is entitled to a fee of twenty-five cents for every certificate, including seal. As the statute does not provide or contemplate that the witness shall pay for the certificate, and as the clerk is, under the statute, entitled to a fee of twenty-five cents therefor, it seems clear that it is a proper charge against the county.

Second. The item of $234.25 for certificates of attendance and mileage issued to jurors and court officers under secs.

2560 and 733, R. S. 1878, was also a proper charge against the county for the same reasons.

Third. The item of $22.80 for certified lists of all certificates issued by him to jurors, witnesses, and officers was a proper charge. Subd. 8, sec. 742, R. S. 1878, requires the clerk to keep an accurate list, in a book, of all such certificates issued by him, and annually transmit to the county board a certified transcript of such list for the preceding year. The original list kept by the clerk in a book is certainly a record, and we think he is entitled to compensation from the county for making this copy of one of his records, under the clause of sec. 747 which provides a fee of ten cents per folio for making a copy of "a judgment, order, report or other paper or record."

Fourth. The court allowed a recovery for excess of fees in criminal cases amounting to $81.75. It is said by the appellant that there is no evidence in the case which shows, or from which it can be ascertained, what fees the clerk was entitled to in any criminal case, and our own examination of the record confirms the statement. The county has the burden of proof, and must show by affirmative evidence the illegality of any item or items complained of, before it can recover. We find no proof which would entitle the trial court or this court to find that any clerk's fees charged in criminal cases were excessive, and hence cannot say that the item was improper.

We have now considered and disposed of all the items of the recovery which are complained of by the appellant. We have found no facts in the case which should work an estoppel as against the legal claim of the county. The action is at law. The defendant neither performed any service nor changed his position in any particular by reason of any action taken by the county. He simply performed his duties as he was by law required to do. He has in his pos-

session moneys of the county to which he is not entitled, and he should refund them.

An error is alleged because the court did not by the judgment dismiss the complaint as to the first count, the demurrer to which was sustained. The supposed error is not, however, argued in the brief, and we do not feel called upon to notice it.

There will be no necessity for further proceedings in the court below. The judgment is excessive in a certain amount, viz. $423.05, with interest from the date of demand to the date of judgment, being in the aggregate $449.13. The judgment can be modified by this court, and affirmed as modified.

By the Court.— Judgment modified by deducting therefrom $449.13, and affirmed as so modified. The appellant will be entitled to tax and recover costs in this court.

LANGNECKER, Respondent, vs. THE TRUSTEES OF THE GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF WISCONSIN, Appellant.

September 3 — September 24, 1901.

Benefit societies: Void proceeding: Appeal to grand lodge: Refusal to receive assessments: Waiver of tender: Prohibited business: Expulsion: Forfeiture of beneficiary rights.

1. An appeal from an inferior to a superior tribunal (in this case from the local lodge to the grand lodge of a mutual benefit society) to avoid the effect of an absolutely void proceeding is unnecessary.
2. Where a member of a mutual benefit society has been notified that the lodge will not receive any more money from him because he is no longer a member, his rights will not be prejudiced by a failure to tender payment of assessments subsequently made.
3. A by-law of a mutual benefit society providing that any member who shall after a certain date enter into the business of selling liq-

uor by retail shall be expelled from the order, applies to a member not actually engaged in the prohibited business at the time mentioned, even though he had been so engaged at the time his certificate was issued.

4. Where notice and a hearing are required in such a case, by the terms of the insurance contract, before expulsion can take place, affirmative action to that end is essential to forfeit the rights of the beneficiary, so far as such rights depend on mere membership of the insured in the order.

5. Where the insurance contract expressly provides that there shall be no liability on the beneficiary certificate unless the member shall in every particular comply with all the laws of the order, a violation of any such law by a member *ipso facto* terminates all liability under his certificate.

6. A by-law of a mutual benefit society providing that any member who thereafter engages in the sale of intoxicating liquors shall be expelled from the order, by necessary implication prohibits members from entering into such business.

APPEAL from a judgment of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Reversed.*

Action to recover on a benefit insurance certificate. The trial was by the court. The facts found were, in effect, that in October, 1881, upon the written application of Emil Richter representing among other things that he was a saloon-keeper, defendant, a duly organized benevolent association authorized to do a life insurance business on the mutual assessment plan, accepted the applicant as a member and issued to him a certificate in due form; that by the terms of the application Richter promised, among other things, to comply with all the laws, regulations, and requirements of defendant existing at the time of the issuance thereof or thereafter made, and performance of that promise was made a condition of the enjoyment of any benefit under the insurance contract; that May 2, 1882, the assured married the plaintiff and thereupon a new certificate of membership in the defendant order was issued in place of the one before mentioned, the only change being the substitution of the wife and children of the assured as beneficiaries for the per-

sons originally named in the contract; that Richter paid his dues to the local lodge of defendant according to the terms of his contract and performed his obligations up to the month of September, 1894; that he ceased to be a saloon-keeper prior to the year 1885, but re-entered such business July 1, 1894, and continued therein till September 5, 1897, when he died; that when Richter became a member of the defendant order its laws permitted him to a conduct a saloon business, but in June, 1893, a by-law was regularly adopted to the effect that if any member thereof should engage in such business after August 1, 1893, he should be expelled from the order, which by-law has ever since been in force; that August 11, 1894, Richter, without notice or opportunity to be heard, was expelled from the order by a resolution of the local lodge of defendant, to which he belonged; that defendant is made up of a grand and subordinate lodges; that the subordinate lodge to which Richter belonged, by the terms of the insurance contract, was entitled to regularly collect of him one dollar every three months, and the continuance in force of his membership certificate was dependent upon payment of such dues and of assessments made by the grand lodge in accordance with the rules of the order; that it was customary and rulable for the local lodge to collect the assessments made by the grand lodge; that there were two such assessments in August, 1894, which were paid by Richter to the proper officer of the local lodge, called the "financier;" that three assessments were made in September, 1894; that Richter tendered to the financier of his lodge the September assessments, but his tender was refused upon the ground that he was no longer a member of the order; that Richter's membership was included in those assessed up to and inclusive of January, 1895, notice of the assessments being, according to the laws of the order, published in its official paper, a copy of which was regularly mailed to him; that the notice was to

the effect that it would come to suspended members, but that the sending thereof to them was not intended as a recognition of them as belonging to the order; that the notice also contained the following, which was in accordance with the insurance contract: "You are hereby notified that you must pay the above assessment on or before the 28th day of the month or your beneficiary certificate will stand suspended and in the event of your death will be void." The dues of the local lodge and the assessments made by the grand lodge, not paid by Richter, amount to $85.75.

From such facts the court found that Richter was a member of the defendant order in good standing at the time of his death; that the procedure required to be followed in case of the expulsion of a member not having been followed, the proceedings in that regard were void, and that plaintiff was entitled to recover the amount promised to the beneficiary by the terms of the insurance contract, less $85.75.

The laws of the order, which were a part of the insurance contract, included the following:

"Any member . . . upon neglecting or refusing to pay his dues [to the grand lodge] for a period of six months shall be reported to the [grand] lodge by the financier, and the master workman shall, unless otherwise directed by the lodge, thereupon declare such member suspended from the order."

"Any member failing or neglecting to pay all assessments made upon him for the beneficiary fund . . . on or before the 28th day of the month in which said assessments are made, shall forfeit all his rights as such member, shall stand suspended from all the rights, benefits, and privileges of the order from and after that date, and shall not be reinstated except as herein provided."

Judgment was rendered in favor of plaintiff.

C. M. Masters, for the appellant.

For the respondent there was a brief by *Robt. Lees* and *Theo. Buehler*, and oral argument by *Mr. Buehler*.

MARSHALL, J. It is conceded that the proceeding to expel Richter from defendant order was void, but it is said his remedy was by appeal. No reason is perceived why the rule does not apply, as contended by respondent's counsel, that an appeal from an inferior to a superior tribunal to avoid the effect of an absolutely void proceeding is unnecessary. So far as we have been able to discover, the courts that have passed upon the question have so held. *Glardon v. Supreme Lodge K. of P.* 50 Mo. App. 45; *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 463; *Hall v. Supreme Lodge K. of H.* 24 Fed. Rep. 450. The text-writers state the law likewise. Niblack, Benefit Societies, 101. The principle seems so elementary that we are not required to resort to authority to support it.

But it is said by appellant that, conceding the expulsion was void, Richter ceased to be a member for failure to pay the assessments that became chargeable to his membership subsequent to those which were tendered and refused. The conclusive answer to that is that the assured, having been notified that the lodge would not receive any more money from him because he was no longer a member thereof, was not bound to offer to pay assessments subsequently made. The provision of the insurance contract rendering it void for failure to pay assessments contemplated a readiness on the part of the assurer to receive the amount of assessments when seasonably tendered; and a refusal in that regard upon grounds in their nature continuous suspended the operation of such provision till notice was brought home to the assured that the attitude of the assurer had changed. There is abundant authority to that effect, but as this court has very recently considered the subject, reference to authority elsewhere is unnecessary. In *Guetzkow v. Mich. M. L. Ins. Co.* 105 Wis. 448, Mr. Justice DODGE, speaking for the court, said:

"The rule of law is maintained with great unanimity that one party cannot predicate a forfeiture upon an omission by

the other which his own conduct has helped to bring about; that a declaration that a policy of insurance is already forfeited will constitute a sufficient justification for the omission to tender subsequently accruing premiums or instalments, upon the ground that the assured is justified in believing that no tender would be accepted, and the formality is therefore unnecessary."

It follows that Richter was a member of the *Order of United Workmen* at the time of his death. But appellant insists that, conceding such to be the case, respondent was not entitled to recover, since it was not disputed that Richter entered into the business of selling intoxicating liquor as a beverage subsequent to August 1, 1893, contrary to the provision of the insurance contract prohibiting him from so doing, and that he remained in such occupation up to the time of his death; that for such violation of the laws of the order the provision of the contract of insurance, to the effect that there shall be no liability upon any certificate of membership if the member shall be guilty of having violated any law of the order or is not in good standing at the time of his death, extinguished all liability under the certificate. Respondent answers that proposition by saying that Richter was engaged in the business of selling intoxicating liquor as a beverage at the time his membership commenced; that though it was competent for the order to make outstanding certificates of membership subject to laws created by its governing body subsequent to the issuance thereof, the law invoked by appellant was not intended to affect members circumstanced as Richter was; that it was aimed at persons entering into the business of selling intoxicating liquor as a beverage who were not so engaged at the time of the passage of the law or had not theretofore during their membership been in such business; that persons who had been in such business during their membership and prior to the passage of such law were permitted to

continue therein or go out of and subsequently re-enter it at pleasure. The language of the law is as follows:

"Any member of the order who shall after August 1, 1893, enter into the business of selling by retail, of intoxicating beverages, shall be expelled from the order."

That seems plain. There is no uncertainty either as to its meaning or purpose; therefore there is no room for the application of rules of construction. Counsel would have the law read as if a particular class of members of the order were excepted from its provisions. We can see no justification for ingrafting such an exception upon a plain contract by judicial construction. The law plainly applied to all members of the order not engaged in the prohibited business at the time mentioned therein, and Richter had not been so engaged for some nine years.

It follows that Richter, at the time of his death, was a member of defendant order and in good standing so far as any affirmative action on its part indicates to the contrary, but was nevertheless guilty of having violated one of its laws for which his expulsion from the order was expressly required upon proper proceedings being had for that purpose. No discretion rested with the governing body of the order having jurisdiction of the matter, to expel or not to expel him. Upon the subject being presented for action in the manner provided by the laws of the order there was room for action in but one way. Counsel for respondent contends that regardless of that, affirmative action by the order in the lifetime of Richter was essential to forfeit the rights of the beneficiary under the insurance certificate; that Richter was a member of the order when he died and presumably in good standing; that the contrary could not be legitimately shown otherwise than by the records of the order; that death ended the power of the order to take such action and that thereby the rights of the beneficiary became fixed. So far as the rights of the beneficiary depend on mere membership

of Richter in the order, counsel's position is unquestionably sound. Under the insurance contract expulsion could not take place except upon notice and hearing in the manner provided in the by-laws. Obviously, since such proceedings were impossible after the death of the assured, the termination of his membership *nunc pro tunc* was impossible. Courts have frequently held under similar contracts that the status of a member cannot be shown so as to avoid liability on the certificate or policy of insurance after his death otherwise than by showing by the records of the order that appropriate proceedings were had by it during his lifetime. *Olmstead v. Farmers' M. F. Ins. Co.* 50 Mich. 200; *Baker v. Citizens' M. F. Ins. Co.* 51 Mich. 243.

But appellant's counsel contends that the by-law exempting it from all liability upon the certificate in case of any violation by the member to whom it was issued of any law of the order, is self-executing; that while social benefits in the order depended upon membership therein, the liability to the beneficiary named in the certificate depended upon both membership of the assured in good standing at the time of his death and freedom of any violation by him of the laws of the order. That contention has not been satisfactorily answered by respondent's counsel, either by argument or by authority.

Whether Richter's transgression of the law of the order *ipso facto* terminated all liability under his certificate of membership depends entirely upon whether that is what the parties to the insurance contract agreed to. *Freckman v. Supreme Council R. A.* 96 Wis. 133; Niblack, Benefit Societies (2d ed.), § 289. In disposing of questions of this kind courts must not lose sight of the fact that they do not make insurance contracts for parties, and that in dealing with such a contract their duty is the same as when dealing with any other contract; that they must determine the intention of parties from the words such parties chose to use to ex-

press such intention, and give effect thereto so far as the judicial reading does not violate any rule of language or of law; that courts have no right to depart from that line by twisting words out of their natural and sensible meaning for the purpose of saving anyone from the consequences of what may seem to be a harsh stipulation. So it is useless to refer to cases as ruling the question under consideration or as bearing thereon in which the contracts considered were essentially different from the one before us.

The learned counsel for respondent seem not to reply at all in their printed brief to the contention that liability under the certificate was terminated by a violation of the law of the order, except by pointing to the language which shows that affirmative action on the part of the order was necessary to terminate membership, paying little or no regard to the idea that the contract expressly provided for a forfeiture of all liability under the insurance feature of the membership, without necessary loss of social benefits, by actual suspension or expulsion therefrom. The exact wording of the provision of the certificate which seems to apply is as follows:

"No liability for the payment of any money from this fund shall arise by virtue of any beneficiary certificate, or certificate of membership, or otherwise, unless the member of the order named in such certificate shall, in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof; and shall, at the time of death, be a member of said order in good standing."

That law was, in effect, embraced in the certificate of membership in the following language:

"This certificate is issued upon the express condition that Emil Richter shall in every particular while a member of said order comply with all the laws, rules and requirements thereof."

When we consider the quoted by-law in connection with the language of the certificate and the following language

in the application for membership, "I agree that compliance on my part with all the laws, regulations and requirements which are or may be hereafter enacted by said order is the express condition upon which I am entitled to participation in the beneficiary fund and to have and enjoy all the other benefits and privileges of said order," we have a contract about as plain as language can express it, under which noncompliance with any law of the order *ipso facto* terminated all liability thereunder. In most if not all of the cases where the contract considered provided that nonpayment of dues or any violation of any other requirement of the order should terminate the transgressor's membership or his right to participate in the insurance fund of the order, it was held that the provision was self-executing, requiring no affirmative action of the order to terminate its liability. In all of such cases there were laws of the order also, as in this case, providing for a trial of the guilty member and his punishment by suspension or expulsion or in some other way. The fact in that regard was not the turning point, but the question of whether the contract of insurance provided for its termination solely by the act of the assured.

In *High Court I. O. F. v. Zak*, 136 Ill. 185, the certificate considered contained this provision:

"This certificate is issued . . upon condition that the said member complies . . . with the laws, rules, and regulations now governing said order or that may hereafter be enacted by the High Court. These conditions being complied with the said High Court . . . hereby promises," etc., ". . . provided that said member is in good standing in this order at the time of his death."

The constitution of the order defined what should constitute a member thereof in good standing, and in close connection therewith provided that any member not coming up to the constitutional standard, "upon due trial and conviction thereof shall be reprimanded, suspended, dropped, or expelled as the court or other lawful authority may

determine." The court held that, looking to all the provisions of the insurance contract, it provided that good standing should be the test of the right to the benefits under the insurance certificate and that no penalty could be visited upon a member for any violation of its laws save upon trial and conviction by the law department of the order; hence, that while good standing was a requisite to liability upon the certificate of membership, the only proof admissible to overcome the presumption in favor of such standing was some proper corporate action of the order had during the life of the member whose conduct was in question. At the same time the court was careful not to impair the force of the decision in *Supreme Council R. T. v. Curd*, 111 Ill. 284, where a contract substantially the same as the one before us was considered and it was held that a violation of the law of the order *ipso facto* terminated its liability to the beneficiary of the transgressor. The court said:

"The *Curd Case* is distinguishable from the case at bar because in that case the assured in his application for membership not only agreed that compliance with the laws and regulations of the society should be necessary to entitle him to participate in the fund, but in addition thereto also agreed that violation of his pledge of total abstinence, or suspension or expulsion for a violation of any of the laws, should operate as a forfeiture of his right to the fund, because the certificate in the *Curd Case* recited that it was issued to the beneficiary upon the express condition that he should faithfully maintain his pledge of total abstinence and comply with all the laws, rules and regulations."

It will be readily noticed that the contract in the *Curd Case* was not as strong in favor of the order as the one before us, and, turning to the opinion of the Illinois court in such case, we observe that it was there pointed out, and the decision turned on the fact, that loss of membership by the affirmative action of the society and violation of the contract of insurance were by its terms made independent

grounds of forfeiture of the right to participate in the beneficiary fund of the society. The court said:

"The words 'shall faithfully maintain his pledge of total abstinence and comply with all the laws, rules, regulations, and requirements of said order,' are used conjunctively, and all these requirements are necessary to be observed to entitle the beneficiary to recover upon the certificate, and so it must follow that the omission of either will bar a recovery. But the certificate proceeds, after the language quoted: 'And in case he is in good standing at the time of his decease, then the person or persons hereinafter named shall be entitled,' etc., and the argument upon behalf of the defendant in error assumes that these words are equivalent to saying that if he is not tried and convicted of violating his pledge," etc. " . . . Had it been designed to make trial and conviction a condition precedent to forfeiture, we must presume that it would have been so said; but nowhere is language used that can fairly be construed to mean this. . . . The violation of this pledge is cause for expulsion . . . and it is also a cause for forfeiture of rights and benefits under the certificate."

That case was followed by *High Court I. O. F. v. Zak* when it was first heard on appeal, 35 Ill. App. 613, as well as when it was subsequently heard in the supreme court. The appellate court said:

" It needs no conviction or expulsion by the lodge in such a case to bar the claim on the certificate, because, by its terms, proof of breach of the specific condition upon which it was issued, *ipso facto*, forfeited all claim under it."

To the same effect are *Supreme Council R. L. v. Moerschbaecher*, 88 Ill. App. 89; *Hogins v. Supreme Council C. of R. C.* 76 Cal. 109; *McMurry v. Supreme Court K. of H.* 20 Fed. Rep. 107.

It seems clear that effect must be given to the plain terms of the insurance contract, that proof of a violation of its provisions is a defense to any action to recover thereon. Such provision is as clearly self-executing as are those frequently met with which provide that if a member fails to pay any assessment upon his membership, made in accord-

ance with the insurance contract, he shall from the time of such failure stand suspended and no longer a member of the order. The one says compliance with all the laws, rules, and regulations of the order is a condition precedent to any liability thereon; the other that payment of dues according to the contract is a condition precedent to the continuance of the membership.

No suggestion has been made which from any standpoint reasonably supports a contrary view to that above expressed, except that the law adopted by appellant merely required the expulsion of members as a penalty for entering into the business of selling intoxicating liquor as a beverage, and need not necessarily be construed as prohibiting members from entering into such business, and that therefore the promise of Richter that he would obey all the laws, rules, and requirements of the order as a condition precedent to liability to his beneficiary, does not necessarily include a promise not to enter into the business mentioned in the law. We are not inclined to treat that suggestion as unworthy of consideration. The by-law did not expressly prohibit members from entering into the business of vending intoxicating liquors. However, it seems that no more strict rules of construction should be applied to it than are ordinarily applied to penal statutes, and we may venture safely to say that such statutes are generally held by necessary implication to prohibit those things that are made punishable by them; that such implied prohibition exists in all cases where the purpose of the law is to make the act punishable against which it is directed. *Lewis v. Welch*, 14 N. H. 294; *Bancroft v. Dumas*, 21 Vt. 456; *Hallett v. Novion*, 14 Johns. 273; *Mitchell v. Smith*, 1 Bin. 110. In 1 Parsons, Cont. (8th ed.), 458, it is said that Sir JAMES MANSFIELD established a more reasonable rule than had theretofore existed in England, to the effect that in all cases where a statute provides a penalty for an act, that is a

prohibition of the act, and that such "has always been the prevailing, if not the uncontradicted, rule of law on this subject in this country."

We must hold that Richter's violation of the law of the appellant order on the subject of entering into the business of selling intoxicating liquors forfeited all benefits under his certificate of membership, and that the circuit court should have rendered judgment in favor of appellant.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment dismissing the complaint with costs.

MORRELL, Respondent, vs. GLASSPOOLE, Appellant.

September 3—September 24, 1901.

Appeal from judgment: Orders reviewable: Justices' courts: Removal for prejudice: Amendment of affidavit.

1. Where an action had been removed from a justice of the peace on the ground of prejudice, and then taken by appeal to the circuit court, an order of the circuit court permitting the justice to attach his signature *nunc pro tunc* to the jurat of the affidavit of prejudice is reviewable on appeal from the judgment of the circuit court, under sec. 3070, Stats. 1898, although not brought into the record by a bill of exceptions. *Hewitt v. Follett*, 51 Wis. 264, followed.
2. Such amendment of the affidavit was properly permitted under sec. 2830, Stats. 1898, upon proof that the oath had in fact been administered by the justice and that all requirements of sec. 3616 had been met, the oath being sufficient even without an affidavit.

APPEAL from a judgment of the circuit court for St. Croix county: A. J. VINJE, Judge. *Affirmed.*

This action was commenced in justice's court. On the return day the defendant appeared and filed an affidavit of prejudice, with a request that the case be removed to the

county court of St. Croix county under sec. 4, ch. 119, Laws of 1899. The case was so removed, and the trial was had. An appeal was taken to the circuit court. There it was discovered that the justice before whom the oath of prejudice was taken had failed to sign the jurat. The plaintiff then procured the affidavit of the justice to the effect that upon the return day the defendant actually made the oath to the affidavit filed, but that through inadvertence and mistake he failed to attach his signature to the jurat. Thereupon the circuit court entered an order permitting the justice to sign the jurat to the affidavit contained in the record, and provided that when so signed it was to have the same force and effect as if signed before it was filed with the justice. The case was then tried, and judgment entered for the plaintiff. No exception was taken to the order mentioned, and no bill of exceptions was settled. The defendant has taken an appeal from the judgment, and seeks to attack the validity of said order.

A. J. Kinney, for the appellant, contended, *inter alia*, that the justice does not certify that the defendant "made affidavit" or "made oath." He merely says that the defendant *delivered* such an affidavit. A docket entry that an affidavit was made and filed is not sufficient evidence of that fact. The affidavit must show for itself. *Wells v. Am. Exp. Co.* 55 Wis. 23, 33. See, also, *Detroit S. Co. v. Kelly*, 78 Wis. 134; *Conley v. Conley*, 78 Wis. 665; *Billings v. Noble*, 75 Wis. 325; *Steen v. Norton*, 45 Wis. 412; *Maguire v. Bolen*, 94 Wis. 48; *Hager v. Falk*, 82 Wis. 644. The so-called affidavit of prejudice was not an imperfect affidavit — it was not an affidavit at all. *Kidder v. Fay*, 60 Wis. 218; *Appeal of Royston*, 53 Wis. 612. The theory on which a defective affidavit is held good as an oath is that it contains a certificate that the oath has been administered. The fact that the affidavit was sworn to cannot be established by affidavit. *Kidder v. Fay*, 60 Wis. 218; *Klauber v. Charlton*,

47 Wis. 564, 572; *People ex rel. Rogers v. Spencer*, 55 N. Y. 1. In the following cases an unsigned or otherwise defective jurat has been held to invalidate the affidavit: *Holmes v. Crooks*, 56 Neb. 466; *Alabama Nat. Bank v. Chattanooga D. & S. Co.* 106 Ala. 663; *Smith v. Lyons*, 80 Ill. 600; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237; *Missouri Pacific R. Co. v. Brown*, 53 S. W. Rep. 1019; *Whitehead v. Hamilton R. Co.* 53 N. J. Eq. 454; *Robinson v. Gregg*, 57 Fed. Rep. 186; *Hommer v. McCartney*, 2 Colo. App. 422.

For the respondent the cause was submitted on the brief of *W. F. McNally.*

BARDEEN, J. The defendant is seeking to take advantage of a mistake made in a proceeding instituted by him to remove the case from the justice before whom this action was commenced. The statute (sec. 3616, Stats. 1898) provides that if the defendant shall "make oath that, from prejudice or other cause, he believes that such justice will not decide impartially," the justice shall transmit the papers to some other magistrate. *Burns v. Doyle*, 28 Wis. 460, decides that this statute does not require the party to make an affidavit, but only an oath. The record of the justice recites that the "defendant appeared in person and delivered to the court an affidavit for a change of venue on the ground of prejudice." The case was accordingly removed, was tried in county court, and appealed to the circuit court, where the proceedings mentioned in the statement were duly taken. The question is raised whether the order of the circuit court permitting the amendment of the affidavit was such a one as this court might review under section 3070, without its being brought into the record by a bill of exceptions. Upon the authority of *Hewitt v. Follett*, 51 Wis. 264, we shall assume that the order mentioned is one properly reviewable on an appeal from the judgment.

The remaining question is whether the amendment to the affidavit was such a one as might properly be permitted under sec. 2830, Stats. 1898. We think it was. In *Lederer v. C., M. & St. P. R. Co.* 38 Wis. 244, the defendant took an appeal, but the notary, by inadvertence, omitted to sign the jurat to the affidavit of appeal. On a motion to dismiss, it was shown that the oath had been actually administered. The motion was denied, and the court authorized the notary to sign as of the day on which the affidavit was in fact made. This court approved the procedure under the provisions of the statute mentioned. Again, in *State ex rel. Weber v. Cordes*, 87 Wis. 373, where the notary omitted to sign the jurat to the verification of a petition for a writ of *certiorari*, it was held proper to allow the defect to be cured by his signing *nunc pro tunc*. Here all the requirements of sec. 3616 had been complied with. The defendant had made the oath in due form before the justice. The case was then removed to the county court upon a record which showed that such affidavit had been filed. Had the mistake of the justice been discovered, the error could have been corrected in that court. So long as the oath had in fact been administered, and all the demands of the statute had been met, we see no reason why, when it was discovered that the jurat to the affidavit had been omitted, it could not be corrected, even after the case got into circuit court. The record of the justice showed that an affidavit of prejudice had been duly presented. But it is said the affidavit so presented was unsigned, and was no affidavit, under the ruling of *Kidder v. Fay*, 60 Wis. 218. The same contention was raised in *Burns v. Doyle*, 28 Wis. 460. The affidavit presented and preserved in the record had no venue laid. It was contended that the statute did not authorize the removal of a cause upon an affidavit, and that if it does the affidavit must be in due form, containing everything essen-

tial to its validity, including a venue. In disposing of this contention the court made use of the following language:

"This view of the question is founded upon the assumption that the oath and the affidavit are two separate and distinct things, which is not true. The affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although it may be entirely unavailable as an affidavit."

Other language in this opinion is applicable to the facts in this case, but need not be here repeated. We are satisfied that the record transmitted by the justice to the county court was sufficient to show jurisdiction, and that the defect in the affidavit was properly cured under the terms of the statute cited.

By the Court.—The judgment is affirmed.

FINNEY, Receiver, and others, Appellants, vs. GUY, Respondent.

September 3—September 24, 1901.

Appeal: Notice of motion: Withdrawal: Record: Bill of exceptions: Judgment after reversal: Res judicata.

1. On the same day respondent served a notice of motion to dismiss an appeal and a notice of motion to strike certain papers from the record. Two days thereafter he served a notice that "the annexed notice of motion to dismiss the appeal . . . a copy of which is hereto annexed is hereby withdrawn." Annexed thereto were copies of the notice and motion to strike out. *Held*, that the motion to strike out was withdrawn.
2. Steps taken in the trial court which do not properly become a matter of record can come before this court only by a bill of exceptions settled and authenticated as such by the trial judge. A declaration of the trial judge, appended to an order sustaining a demurrer, to the effect that the order was excepted to on certain grounds specified, is no proper part of the record on appeal and cannot be considered.

3. Where an order overruling a demurrer is reversed and the cause remanded "for further proceedings according to law," a judgment subsequently entered by the trial court does not become the judgment of the supreme court, but is subject to review on appeal.

4. A decision on appeal that a complaint fails to state any cause of action must control both the trial court and this court at all subsequent stages of the same case, no matter what new or different arguments may be urged against its correctness.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Motion to dismiss denied; judgment affirmed.*

Suit by the receiver of a Minnesota corporation, appointed by one of the courts of that state, to recover the additional stockholder's liability under the laws and constitution of Minnesota. The complaint was before this court and considered on demurrer in *Finney v. Guy*, 106 Wis. 256, wherein it was decided that the complaint did not state a cause of action. The former order of the circuit court overruling demurrer thereto was reversed, and cause remanded "for further proceedings according to law." Upon filing *remittitur*, the circuit court entered an order "that the demurrer of the defendant to the complaint herein be sustained, and the complaint be dismissed, with costs to the defendant," whereupon judgment of dismissal was entered, from which the plaintiffs appeal. The respondent moves to strike certain papers from the return on appeal, and moves separately to dismiss the appeal.

For the appellants there was a brief *Fred W. Reed* and *F. M. White*, and oral argument by *Mr. Reed*.

For the respondent there was a brief by *John W. Bashford*, attorney, and *R. M. Bashford*, of counsel, and oral argument by *R. M. Bashford*.

DODGE, J. The respondent presented and argued a motion to strike certain papers out of the record sent up from the court below, but we feel obliged to decline considera-

tion, for the reason that, such motion, and a notice that the same would be made, having been served on the appellants on the 15th day of August, 1901, the respondent, on the 17th day of August, served a notice that "the annexed notice of motion to dismiss the appeal in this action heretofore served on you on August 15th, a copy of which is hereto annexed, is hereby withdrawn." Annexed to that notice were copies of the notice and motion for striking out certain parts of the record. It may be, as is suggested, that respondent intended to withdraw a motion to dismiss, which also was served on the 15th day of August, but the annexing of copies of this particular motion to strike out could have left no reasonable doubt in the mind of the appellants that the motion now attempted to be presented was withdrawn. Appellants were justified in that conclusion, and are therefore without notice, as our rules require, of the making of such motion.

We may say in this connection, however, that one of the elements sought to be eliminated from the record, which consists in a declaration by the circuit judge, appended to the order sustaining the demurrer, to the effect that the plaintiffs excepted to such order and specified certain grounds of exception, is no proper part of the record before us on appeal, and its physical presence in the roll of papers transmitted by the clerk of the circuit court can have no effect. It cannot serve to inform us of any steps taken in the court below. Any such steps which do not properly become a matter of record can only come to our notice by a bill of exceptions, settled and authenticated as such by the circuit judge. The document referred to is mere surplusage and of no efficacy whatever.

Respondent also moved, upon due notice, to dismiss this appeal for the reason that the judgment of the circuit court was, as asserted, entered in obedience to the mandate of this court, and therefore was and is the judgment of this

court and not subject to appeal; citing in support of that position *Patten P. Co. v. Green Bay & M. C. Co.* 93 Wis. 283. The position is not well taken. In the *Patten Case* the action was remanded with directions to the court below to enter a judgment, which it did. In this case, upon the overruling of the demurrer, the cause was remanded "for further proceedings according to law." This placed it again in the control of the trial court to ascertain and decide what the law might be in any future attitude the case might take, guided and controlled, of course, so far as this court had spoken, by the law laid down in its opinion. After the remission of the case, it was possible for the circuit court to decide either rightly or wrongly as to the law, and therefore as to the steps that should be taken or decisions that might be rendered. Its decisions were not those of this court, but its own, and subject to review upon appeal as in other cases. *Great Western T. Co. v. Burnham*, 162 U. S. 339. It follows that the motion to dismiss must be denied, and the action of the circuit court reviewed upon appeal to ascertain whether error has been committed.

Upon the merits, we are, of course, to consider first what was decided by this court upon the first appeal, for whatever we then decided has become *res adjudicata*, and must control both the circuit court and this court at all subsequent stages of the same case. *Prieve v. Wis. State L. & I. Co.* 103 Wis. 537; *Wollman v. Ruehle*, 104 Wis. 603; *Richter v. Estate of Leiby*, 107 Wis. 404. Turning to the former opinion and judgment in this court (106 Wis. 256), we find it decided unambiguously that the complaint fails to state any cause of action maintainable in our courts. That being so, the action of the circuit court in sustaining the demurrer to that complaint, and, it not being amended, in entering judgment dismissing the same, is necessarily right, and must be affirmed upon this appeal, no matter what new or

different arguments might now be urged against the correctness of the conclusion then reached.

By the Court.— Respondent's motion to dismiss the appeal is denied, with $10 costs. The judgment appealed from is affirmed.

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MUELLER, Appellant, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

September 4 — September 24, 1901.

Landlord and tenant: Fixtures: Right of removal.

Plaintiff, while employed by a railway company as section foreman and living by its permission in the section house, built a lean-to kitchen addition, attached to the house, with the knowledge and consent of the company. Afterwards the company papered and sided the outside of both the section house and the addition. *Held*, that the addition became a fixture which plaintiff could not remove after his discharge by the company and removal from the house.

APPEAL from a judgment of the circuit court for Pepin county: E. W. HELMS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *C. M. Hilliard*, and for the respondent on that of *Wm. E. Plummer*.

CASSODAY, C. J. This is an action to recover damages for the wrongful conversion of a lean-to upon the section house of the defendant at Savoy, near Maxville station. Issue being joined and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The following facts appear from the record and are undisputed. In the spring of 1897 the defendant employed the plaintiff to work for it as section foreman on that section, with the understanding and agreement that the

plaintiff and his family should occupy the section house of the defendant at that place. Such section house was sixteen feet wide by twenty-six feet long, and one and one-half stories or twelve feet high, and situated upon blocks, and upon the land of the defendant, and about 150 feet from the main track, and had an addition to it at the time, which the plaintiff removed after he moved into the section house. While the plaintiff was so occupying such section house with his family, he did, with the knowledge and consent of the defendant, purchase lumber, and construct a small lean-to, for a kitchen, against said section house, at the cost and of the value of $67, and also with such knowledge and consent put in a pump of the value of $7. Such lean-to had two common, middle-sized windows of four lights each, and one door. The section house had boards up and down, and the plaintiff nailed a 2x4 piece of lumber on the section house, and fastened the lean-to to that. The floor was a double floor, and matched, and overhead there was single pine flooring, matched, and the inside was ceiled up with flooring. After the section house and lean-to had remained in that condition for over two years, changes were made on the outside, and, while the plaintiff and his family were still occupying the same as tenant of the defendant, the defendant's bridge carpenters papered and sided the same as directed by the plaintiff, but so that the siding did not go further than the section house, leaving a seam between it and the lean-to. "After the plaintiff had placed the repairs and improvements on said section house in the manner aforesaid, and while he was living in said house, the defendant covered all the same with outside sheeting or lap-siding in the usual way, and thereby converted all the same to its own use and benefit, and prevented the plaintiff from removing all the same, as he intended to do in case the defendant did not buy the same

from him; and that, soon after the defendant had covered the lumber that the plaintiff had placed on its said building and put in said kitchen, it discharged him from its said employment." The plaintiff was so employed by the month for no stated time, and could quit whenever he pleased, and could be discharged at the pleasure of the defendant. He was discharged in the spring of 1900. After he and his family had moved away, the plaintiff asked the defendant's road master if he could not pay the defendant for the siding it had so placed upon the lean-to, and for the two days' work in putting it on, and then be allowed to take the lean-to away and remove it to Durand; but the road master replied that that would destroy or injure the building. The plaintiff paid no rent for so occupying the section house with his family, and never agreed to.

Upon the facts stated, it is obvious that the lean-to became a fixture on the premises of the defendant, within the principles of law repeatedly and recently stated by this court. *Gunderson v. Swarthout*, 104 Wis. 186, 190–192, and numerous cases there cited; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85–92, and cases there cited. It was physically attached to the section house, and hence to the realty. It was adapted to the use and purpose to which the realty was devoted. It was the intention of the plaintiff, in constructing the same, that it should be so attached, and that it should be used in connection with the section house. There is no claim nor pretense that the defendant ever agreed that the plaintiff might remove the lean-to from the premises. Certainly, a tenant of a dwelling house, in possession under a lease which does not provide that he may remove fixtures placed thereon by him, cannot, after he has surrendered possession to his landlord, re-enter, and remove such fixtures, without permission of his landlord. *Yates v. Bachley*, 33 Wis. 185; *Fitzgerald v. Anderson*, 81 Wis. 341; *Keefe v. Furlong*, 96 Wis.

219; *Friedlander v. Ryder*, 30 Neb. 783; *Friedlander v. Hewitt*, 9 L. R. A. 700. We find no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

VANASSE, Respondent, vs. REID, Appellant.

September 4— September 24, 1901.

Attorney and client: Contracts: Burden of proving fairness.

1. The relationship between attorney and client does not render the former incapable of contracting with the latter in respect to the subject matter of the employment, or with the latter's adversary, where a suit is pending between him and the client, though such dealings are regarded by courts with suspicion and are not sustained against the will of the client if his interests have been thereby sacrificed in any respect.
2. If an attorney deals with his client or with a person opposed to such client in respect to the subject matter of the attorney's employment, and such attorney's conduct in so dealing is called in question by his employer, the burden is on such attorney to show that the transaction was in no way to the disadvantage of his client, that his conduct was open and honest, that he fully informed his client of all the facts material for him to know, and that he left nothing undone which he could reasonably have done to promote such client's interests.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Pierce county: JAMES O'NEILL, Judge. *Reversed.*

Action to obtain a conveyance of real estate upon the ground that the defendant was a constructive trustee thereof for plaintiff. The cause was tried by the court. The following is the substance of the findings of fact:

One Cypreansen, by a land contract in the usual form, agreed to sell the land in question to plaintiff for $3,000, and thereafter received from him $1,290, plaintiff in the

meantime taking from the land for his benefit nearly all the saw timber, amounting to about 675,000 feet, and a considerable quantity of cord wood. While litigation was in progress between the parties respecting their rights under the contract, Ray S. Reid being attorney for the plaintiff in this action, he, as agent for defendant herein and wholly with her money and for her benefit, purchased the land of Cypreansen for $1,500, and caused the title thereof to be conveyed to her by deed from each of the parties to the contract. As a part of the transaction and without other consideration than that named, Reid secured for plaintiff a settlement of the litigation mentioned and a cancellation of all Cypreansen's claims against him, amounting to $2,496.16, with interest thereon from February 3, 1898, which claims were a lien on the land, and, to the extent of $450, a lien also upon plaintiff's personal property, and the notes and securities representing the same were delivered to plaintiff and retained by him. The lien upon the land would have been enforced in its entirety by Cypreansen against plaintiff, and was nearly equal to the full value of the land. Ill feeling existed between the parties to the contract, so that, though Cypreansen would not settle with plaintiff for less than the full amount due him, through Reid as agent for defendant he offered to transfer his interest in the land to the latter and release all his claims against plaintiff for the sum of $1,500, upon condition that no benefit from the land itself should accrue to the latter and that the consideration in the transaction moving from defendant should not be disclosed to plaintiff. Reid accepted such offer on condition that plaintiff would consent thereto. He gave such consent and the transaction was consummated, plaintiff receiving substantially all the land was worth to him. Reid did not know the real value of the property at the time of the conveyance thereof to defendant or that it exceeded $1,800, and he would not have paid more than that sum therefor. Though

plaintiff consented to Reid's obtaining the land for defendant as cheaply as he could and to be kept in ignorance of the consideration thereof on condition that all claims against him were canceled, he did not do so freely and understandingly. Reid did not intentionally wrong him, but occupied a situation where he could not perform his full duty to his client. From first to last Reid intended to serve his client faithfully, and in some respects went beyond the calls of duty to effect such intention. After the completion of the transaction detailed, plaintiff requested his attorney to return the sum of $200 paid him for the purpose of making a tender to Cypreansen, saying that such attorney had so profited by the transaction that he could well afford to restore the $200. At that time plaintiff was indebted to his attorney in the sum of $235. Soon after receiving information that plaintiff was dissatisfied with what had been done, Mr. Reid offered to restore the former situation if plaintiff would co-operate by returning and reinstating the canceled securities, which he did not do. Reid took the course last indicated in good faith to avoid breaking his promise with Cypreansen.

The court decided on such facts that plaintiff was entitled to avoid the consent he gave to a conveyance of the land to defendant and his acts to effect such conveyance, upon condition of his paying into court for the benefit of defendant, within sixty days after the entry of the judgment, the amount she had expended for the land, including taxes paid and the expense of recording papers. Judgment was entered accordingly.

For the appellant there was a brief by *H. L. Humphrey*, and oral argument by *Ray S. Reid.*

For the respondent there was a brief by *E. B. & R. E. Bundy*, and oral argument by *E. B. Bundy*. They cited *In re Taylor Orphan Asylum*, 36 Wis. 534; Weeks, Attorneys, §§ 121, 258, 265, 270, 273, 275, 277, 554; *Burnham v.*

Hazelton, 82 Me. 495; *Dunn v. Dunn*, 42 N. J. Eq. 431; *Newcomb v. Brooks*, 16 W. Va. 32; *Armstrong v. Huston's Heirs*, 8 Ohio, 554; *Rogers v. Marshall*, 3 McCrary, 76; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Howell v. Ransom*, 11 Paige, 538; *Gibson v. Jeyes*, 6 Ves. 266; Story, Eq. Jur. §§ 311, 312, note (*a*); 3 Am. & Eng. Ency. of Law (2d ed.), 337, and note; *Yeamans v. James*, 27 Kan. 195; *McDowell v. Milroy*, 69 Ill. 498.

MARSHALL, J. Without the aid of the brief of counsel for respondent we would not be able to discover the precise ground upon which the judgment in this case was rendered. It was expressly found by the court that respondent was not deceived in any way by his attorney and his consent to the transfer of the land thereby obtained. It is also found that respondent obtained substantially the full value of his interest in the land and much more than could have been obtained independent of the transaction complained of. It is further found that a full disclosure of all the facts was made to respondent, except as to the amount the land was to cost appellant, and that he consented to remain in ignorance of that fact and expressly agreed that Mr. Reid might obtain the land for appellant as cheaply as he could on the one condition that all the claims of Cypreansen against him should be extinguished. It is said in the findings that Mr. Reid did more than his full duty to his client as to protecting his rights, with which we perfectly agree, except in agreeing with Cypreansen that the consideration for the land, as between the latter and respondent, by the latter's consent, should not be disclosed to him. That circumstance, it is said, incapacitated Mr. Reid from properly serving his client, because it prevented him from making a full disclosure. No reason is perceived why it should be said there was any wrong in that. Reid was free to state fully the

general nature of the proposed transaction with Cypreansen, which he did, together with all the particulars, except the precise amount of the consideration to move from appellant, and it was left entirely with respondent to say whether the transaction should take place under the circumstances. Respondent was a person of full age and fully competent to and did understand the whole situation. He knew that if the transaction was consummated appellant would get the land for less than the amount due thereon; he knew that he could not obtain the land otherwise than by full payment of his indebtedness, and he knew that such indebtedness substantially measured the entire value of the property. The learned trial court decided that respondent gave his consent reluctantly, but we are unable to find anything in the evidence to clearly indicate that. However, if such was the case, there is no evidence and no finding that he was unduly influenced to give his consent, or that any unfair means whatever were used in that regard, or that he was injured in any way, or that his attorney did not do for him everything that he could have done under the circumstances. On the contrary, the evidence affirmatively shows, and it was in effect decided, that respondent was rescued from his situation in respect to Cypreansen and the land, by the transaction complained of, more advantageously to him than could otherwise have been done. There was an entire failure by respondent to maintain the cause of action set forth in the complaint. It was alleged, in effect, that respondent was ready and willing to take the land of Cypreansen by paying whatever amount was required not exceeding the amount due thereon, and that through the misconduct of Mr. Reid he was precluded from taking advantage of Cypreansen's willingness to part with the property for $1,500. The findings and the evidence negative that. It follows that there is no room in the evidence or the findings to sustain the judgment appealed from on the ground of fraud or undue influence.

The key to the judgment, we apprehend, is found in the following language in the brief of counsel for respondent: "We claim that notice to the agent, Judge Reid, was notice to his principal, the defendant, and that if the agent's conduct was such that had he been the principal the plaintiff would have been entitled to the relief sought as against him, we are entitled to the same relief against her." "We claim that this case comes clearly within the rule that an attorney cannot purchase the property in dispute of his client, be he ever so fair." We confess that we know of no such rule of law. The cases which counsel cite to our attention to sustain it do not do so, and we venture to say the authorities are few in number and contrary to the settled rule on the subject that do so hold. The general rule is that an attorney is not incapable of contracting in respect to the very subject of the litigation in which he is engaged and for his own benefit, either with his client or his client's adversary, so long as the transaction is open, honest, and in every way fair to the client. Such transactions are scrutinized with great care by courts because of the opportunity an attorney has for profiting at his client's expense, and are not sustained unless the former is able to and does show that the latter acted understandingly upon a full disclosure by the attorney of all the material facts, and that his interest did not militate at all against his using his best exertions for the benefit of his client. The burden of proof is on the attorney to show that his purchase of his client's property in dispute was in no way to the disadvantage of the latter and that the client was a willing party to the transaction and without any undue influence by his attorney. But if the attorney satisfactorily lift such burden, the transaction cannot be impeached. Equity protects the client from all probable injury, holding the attorney to strict accountability in every such transaction, and putting upon him the burden of proving his innocence as indicated, but goes no further. *La-*

clede Bank v. Keeler, 109 Ill. 385; *Yeamans v. James*, 27 Kan. 195; *Felton v. Le Breton*, 92 Cal. 457; *Cooper v. Lee*, 75 Tex. 114; *Dunn v. Dunn*, 42 N. J. Eq. 431; *Thomas v. Turner's Adm'r*, 87 Va. 1; *Lewis v. J. A.* 4 Edw. Ch. 599; Weeks, Att'ys at Law, § 273; 3 Am. & Eng. Ency. of Law (2d ed.), 332. Such a transaction, says Judge Story, "is not necessarily void throughout, *ipso facto*. But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him, is bound to show that a reasonable use has been made of that confidence." Story, Eq. Jur. §§ 310, 311. Authorities in support of the foregoing could be cited to almost any length.

In this case there was the utmost good faith on the part of Mr. Reid. There was no undue influence exercised by him over his client. The latter obtained a fair value for his property, and, as has been said, more than could have been obtained but for the transaction in question. The client acted with full knowledge of all the facts material for him to know. He did not know the amount defendant was to pay for his land, but he knew that it was a part of the transaction that such fact was to be kept secret from him, and consented to it for the very purpose of securing an extinguishment of Cypreansen's claims against him. He received disinterested advice on all legal questions and full knowledge of all facts that were material for him to know in order to determine what action to take on the business feature of the matter, and also the benefit of the best efforts of his attorney to promote his interest as to such feature. That satisfies every test of the validity of the transaction which rules of law or of equity require.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of defendant.

DICKSON and another, Appellants, vs. PRITCHARD, Respondent.

September 4 — September 24, 1901.

Deceit: Fraudulent concealment of facts: Evidence: Conjecture.

1. In an action for deceit whereby plaintiffs were induced to enter into a contract with defendant, a recovery cannot be based upon defendant's failure to disclose facts within his knowledge, which were not referred to in the conversation between the parties before the contract was made and which defendant did not know were of importance to plaintiffs.
2. A recovery of damages having no other basis than mere speculation or conjecture cannot be sustained.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

This action is to recover damages growing out of certain false representations claimed to have been made to induce the plaintiffs to enter into a contract with the defendant to ream and case a well on the defendant's farm. The complaint sets out a written contract, under which the plaintiffs agreed to ream and drill a well on defendant's farm of sufficient size to admit five-inch oil-well casing, to the depth of three hundred and twenty-eight feet, or to the lower edge of the St. Peter sandstone, or deeper, if necessary to secure a supply of water sufficient for all the stock kept on defendant's premises, for the sum of $300. The plaintiffs are alleged to have been induced to enter into this contract upon the representation by defendant that the well was free from all foreign matter or objects that would obstruct the work, which representations are alleged to have been untrue. It is alleged that after the work had been commenced, and after the drilling and reaming had proceeded to the depth of two hundred and forty-eight feet, the plaintiffs encountered some object of an iron or metallic nature, which stopped their progress and rendered it impossible to continue the work, and they were compelled to abandon it

and were put to great expense and labor in removing their tools, etc. Their damages are placed at the sum of $920, for which they demanded judgment.

The answer denies making the representations alleged, denies that the well was obstructed, and alleges that they were compelled to abandon their work because they attempted to drive the well casing without having reamed the well properly. The answer also contains a counterclaim for damages for failure to complete their contract. To this counterclaim a reply was served, putting the matters therein stated in issue. The case was tried, and the jury returned a verdict of no cause of action as to the claims of both parties. From a judgment for the defendant the plaintiffs have taken this appeal.

Walter C. Owen, for the appellants.

For the respondent there was a brief by *A. Combacker* and *F. M. White*, and oral argument by *Mr. White*.

BARDEEN, J. A number of errors relating to the rejection and admission of testimony are argued, but none of them is of sufficient importance to require extended notice. The refusal to allow an amendment to the complaint to the effect that defendant had knowledge that an old well existed within a short distance of the new one, and did not disclose such knowledge to the plaintiffs, was not erroneous. There was no evidence that the defendant had any knowledge that the two holes came together, as was claimed by the plaintiffs, or that he was familiar with any fact or circumstance from which such knowledge could be inferred. Without some evidence tending to show knowledge by defendant that such information was of importance to the plaintiffs, no duty to make disclosure is apparent. There was no reference to the old well in the conversation between the parties before the contract was made, and no expression of opinion or representation made in relation

thereto. The court's ruling was proper and must be sustained.

Another question argued with considerable earnestness is that the verdict should be set aside as being contrary to the evidence. We have examined the record with care, and considered the plaintiffs' testimony with reference to the conditions claimed to exist in the well, and the representations alleged to have been made. It may be admitted, for the purpose of this decision, that the representations made by defendant were as set out in the complaint. We then come to the consideration of the evidence as to the falsity of such representations. The allegation is that after the well had been reamed and drilled to the depth of about 248 feet, and the oil-well casing had been inserted, the plaintiffs "encountered and came in contact with some foreign matter, substance, or object in said well of an iron or metallic nature, which arrested and stopped their progress and rendered it impossible for them to continue their work." The representation was that the well was free from any such obstruction. The plaintiffs' evidence details the progress of their operations, and describes how their work was stopped. Their theory was that the new well united with an old well that had been drilled about twenty inches distant, in which some tools had been lost and the hole abandoned, and that the obstruction they met with was the tools which had been lost in the old hole. The evidence is that the tools had been lost at the depth of 240 feet, and that they were twenty-five feet in length. It is suggested that the new well had been drilled past the lost tools, and that, when plaintiffs attempted to sink the casing the shoe at the bottom struck the tools and prevented its sinking. Plaintiffs' case, as to this feature of it, was based entirely upon theory, speculation, and conjecture. It was their misfortune that definite testimony could not be procured. Recoveries cannot be allowed that have no other basis than mere speculation or conjecture. The

jury found against the plaintiffs. A careful review of all the facts convinces us that this conclusion was fully warranted. The testimony in this regard is so speculative and conjectural that we are not able to see how, if a verdict had been rendered for the plaintiffs, it should have had any substantial basis to rest upon. It is unnecessary to run over the great volume of testimony presented in the record. It is sufficient to say that, giving it the most favorable consideration it will bear, it leaves the plaintiffs' right to recover in so much doubt and uncertainty that a verdict for defendant might properly have been directed. This renders it unnecessary to consider other questions discussed in the briefs.

By the Court.—The judgment is affirmed.

HACKER, Respondent, vs. HEINEY, Appellant.

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September 5 — September 24, 1901.

Slander: Evidence: Instructions: Immaterial errors: Damages: Mitigation: Presumptions: Punitive damages: Mental suffering: Court and jury: Improper argument of counsel.

1. While defendant's counsel in an action for slander was opening the case the court ruled that he would not be permitted to show trouble between defendant and one of plaintiff's witnesses, but, upon argument, immediately withdrew the ruling and reserved the question until the witness was called, when no adverse ruling was made. *Held*, not prejudicial.
2. Objection to evidence of substantial repetitions of a defamation at times other than those specified in the complaint being first made during the opening argument, the court ruled that such evidence was admissible only as tending to prove express malice. *Held*, that if the defendant desired such restriction further impressed upon the jury, a request therefor should have been made.
3. Except in case of the omission of any instruction whatever upon vital issues, error cannot be assigned upon refusal to give an instruction unless it was formally requested in writing.

4. A witness should not be permitted to testify to his understanding of words charged as slander. In this case, however, the words as to which the witness testified not having been charged as slander in the complaint, but being merely one of several repetitions, offered as tending to show malice and having relation to the question of exemplary damages, and the trial court having required remission of $1,000 of the $1,600 damages awarded, the error, if any, in admitting such testimony is *held* not prejudicial.
5. An award of $600 damages for repeatedly charging a virtuous and reputable married woman with whoredom is not excessive, especially where the jury might have found express malice and awarded punitory damages.
6. In an action against a married woman for charging plaintiff with whoredom, testimony that years of ill health had caused defendant to be very jealous of her husband is admissible, if at all, only as tending to mitigate damages, and not for that purpose unless the fact is properly pleaded.
7. Oral charges of unchastity being actionable *per se*, the presumption arises, without proof, that the person defamed suffered those general damages which are the natural and necessary result of such wrong, i. e. injury to her reputation, and mental pain and humiliation; and such presumption is not overcome by evidence that two of the four hearers disbelieved the charge,— nonbelief of the hearers being merely a fact to be taken into consideration by the jury in awarding damages.
8. Where there are numerous repetitions of a defamatory charge, the question of express malice and punitory damages is for the jury.
9. The rule that there can be no recovery for mental suffering unless accompanied by other actual damages does not apply to cases based on malice.
10. A charge of whoredom against a virtuous and reputable woman necessarily subjects her to anguish of mind and humiliation, and the court may properly so instruct the jury.
11. Objectionable remarks in argument to the jury, which were of such a character that they might easily have been remedied had the attention of the trial court been called to them when made, but were not then objected to and are brought into the record only by affidavit upon a motion for a new trial, will not work a reversal.
12. Where, in an action to recover damages for charging plaintiff with unchastity, no claim was made, either in the pleadings or proof, that plaintiff was other than the most virtuous, or that defendant had any ground whatever to doubt her chastity, statements of plaintiff's counsel in his argument to the jury that a verdict in

defendant's favor would mean virtually that plaintiff was a whore, are *held* to have been an abuse of the privilege of counsel, but to have been so obviously untrue that the jury could not have been misled thereby.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action for slander, in which it was alleged that the defendant spoke of and concerning the plaintiff, on the 15th day of August, 1899, the words, "She is a whore," in the presence of Robert C. Hacker and divers other persons; and that on or about the same day, in the presence of Mrs. Frank Heiney and others, she spoke the words, "There goes that white-headed whore;" and that on the 9th of December of the same year, to the plaintiff, in the presence of her husband, defendant said, "I have reasons for calling you a whore." The answer merely denied the speaking of the words at any time. Testimony was given of the speaking of the words alleged as slanderous at or about the time set forth in the complaint, and also of substantial repetitions of the charge on various other occasions. The court submitted the case to the jury, with directions permitting both compensatory and exemplary damages, and a verdict of $1,600 was returned, from which, on motion for a new trial, the plaintiff was required to remit $1,000, which she did, whereupon the motion for a new trial was overruled and judgment entered for $600 damages and costs, from which the defendant appeals.

For the appellant there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

For the respondent there was a brief by *Jones & Stevens*, and oral argument by *E. Ray Stevens.*

DODGE, J. The alleged errors discussed by appellant are numerous, and several of them so obviously ill assigned or immaterial as to require but passing mention.

Exception was taken to a statement of respondent's attorney in his opening that a witness (Hacker) had heard defendant quarreling with her husband and accusing him of improper relations with plaintiff. The assertion was fully supported by the testimony of Hacker, who details several connubial clashes very fairly satisfying the designation "quarrels," and in one answer he categorically asserts that "as they were quarreling she used to say, 'You always go out whoring,'" etc.

Complaint is made that the court ruled, while appellant's counsel was opening the case, that he would not be allowed to show trouble with this witness Hacker. That ruling was, however, upon argument, immediately withdrawn, and question reserved till Hacker should be on the stand. At that stage no adverse ruling was made.

Plaintiff's witnesses were allowed to testify to substantial repetitions of the defamation at times other than those specified in the complaint. Appellant urges that such testimony should have been admitted only as tending to prove express malice. We find, however, that, when objection to this class of testimony was first suggested in plaintiff's opening, the court did rule that such was the ground of its admissibility. In this position the court was correct. *Born v. Rosenow*, 84 Wis. 620. If defendant desired that restriction further impressed on the jury, a request therefor should have been made.

Error is assigned on failure of the court to give the jury an instruction not reduced to writing, nor even to words, but of which merely the general idea was suggested orally by appellant. Specific error can be assigned only upon refusal to give an instruction formally requested in writing. Sec. 2853, Stats. 1898, evidently contemplates this protection to the trial court in commanding that a requested instruction be given in its exact words or refused *in toto*. Of course, there may be issues so vital that omission of any

instruction whatever thereon is itself error unless excused by a party's failure to call attention to it. *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109; *Dugal v. Chippewa Falls*, 101 Wis. 533. But that rule has no application to the request in this case, which related merely to a detail of evidence. Further than this, however, we find that the court did in fact adequately convey the suggested idea in the charge which he gave.

The contention that the amount of recovery is excessive cannot be considered seriously. We are not prepared to say that $600 is in excess of even reasonable compensatory damages to the reputation and feelings of a virtuous and reputable married woman from the repeated charge of whoredom. Far more impossible is it to hold such sum excessive where the jury may well have found express malice and been entitled to include in their verdict a measure of punishment for such gross and unjustifiable conduct as the defendant's.

Error is assigned upon the admission of certain testimony of the witness Robert Hacker, as follows: He had described an occasion when defendant's husband went down to Otto Hacker's (plaintiff's husband's) house for rubber boots, and on his return was greeted by defendant with the words, "You have been out whoring again." Witness was then asked, "Whom did you understand that she referred to?" and answered, over objection and exception, "Why, it was *Bertha* [plaintiff], because he went down to that place after the boots." It is undoubtedly erroneous to permit a witness to testify to his understanding of the words charged as slander. Townshend, Slander & L. § 375*a*; *Kidd v. Fleek*, 47 Wis. 443. In this instance, however, the words under consideration were not among those charged as slander in the complaint, but were merely one of several repetitions of the same charge against the plaintiff, offered and received as tending to prove express malice, and having relation, not

to defendant's guilt, but to the question of exemplary damages. If any error was committed in admitting this evidence, its effect upon the verdict could have been hardly appreciable, for numerous other repetitions were fully proved. We are satisfied that, if any enhancement of the verdict could be ascribed to this evidence, the $1,000 remission made in the court below wholly eliminated it from the judgment now appealed from, and that defendant has suffered no prejudice. Counsel asserts that the same error was committed in the examination of Maria Heiney, but an examination of the printed case fails to verify the statement.

After defendant had testified to years of ill health, she was asked whether such illness had caused her to be very jealous of her husband, which question was excluded. The relevancy of the inquiry is not apparent, unless as tending to mitigate damages. It could not be admitted for that purpose, for no such fact was pleaded. *Langton v. Hagerty*, 35 Wis. 150; *Wilson v. Noonan*, 35 Wis. 321; *Reiley v. Timme*, 53 Wis. 63.

Appellant urges that nonsuit should have been granted, because plaintiff suffered no actual damages. This position is not easy to understand. The authorities are overwhelming to the proposition that from the speaking of words actionable *per se* a presumption of actual damage arises. *Candrian v. Miller*, 98 Wis. 164, 167. In this state an oral charge of unchastity is actionable *per se*. *Mayer v. Schleichter*, 29 Wis. 646. The conclusion follows, without further proof, that plaintiff suffered those general damages which are the natural and necessary result of such a wrong, namely, injury to her reputation, and mental pain and humiliation. See 18 Am. & Eng. Ency. of Law (2d ed.), 1081, par. 3. Appellant argues, however, that, because two of the four persons before whom the charge was made say they did not believe the statement, this presumption is wholly rebutted as matter of law. That contention cannot be sustained. The fact of

nonbelief, even if by all the hearers, is merely one for the jury to consider in fixing the amount of damages. True, uncredited defamation ordinarily is less injurious than if believed; but neither reputation nor feelings are immune to repeated charges like the one here made, and the court cannot say as matter of law that such disbelief wholly overcomes the presumption. *Bishop v. Journal N. Co.* 168 Mass. 327; *Langton v. Hagerty*, 35 Wis. 150, 160. In this case there was no evidence that Frank Heiney and defendant's husband, David Heiney, did not fully credit the defamatory statements, for which reason it is unnecessary to pursue further the argument based on the assertion of disbelief by hearers of the slander. The presumption of actual damage, both to reputation and feelings, is not overcome, and appellant's argument that punitory damages cannot be recovered in absence of any actual damages becomes inapplicable. There being evidence of numerous repetitions of the defamatory charge, the question of express malice and of punitory damages was open to the jury. *Templeton v. Graves*, 59 Wis. 95, 100; *Born v. Rosenow*, 84 Wis. 620.

Neither need we consider the contention of appellant that, in absence of some other actual damage, no recovery can be had for injury to feelings, for other actual damage is established. The rule for which appellant contends has been applied only to cases of negligence, or of alleged personal injury, where the mental suffering can result only from the injury and not from the tort. *Summerfield v. W. U. Tel. Co.* 87 Wis. 1; *Gatzow v. Buening*, 106 Wis. 1. It has never been applied to cases of malice, such as false imprisonment and slander. The distinction is carefully explained in an opinion by the chief justice in *Ford v. Schliessman*, 107 Wis. 479.

Appellant assigns error upon an instruction to the effect that the words complained of, if uttered, would charge "plaintiff with a serious offense, necessarily subjecting her

to anguish of mind and humiliation." It is insisted that the court usurped the function of the jury in making this statement. We cannot think so. No other conclusion is open to any reasonable mind than that such a charge as defendant made must necessarily cause anguish and humiliation to a virtuous woman, enjoying good name and reputation. Some facts are certain enough for judicial cognizance, and that is one of them.

Appellant urges that the charge to the jury is open to the criticism passed on that in *Gatzow v. Buening*, 106 Wis. 1, where the trial court apparently authorized three classes of damages,—actual, compensatory, and exemplary,—and it was pointed out that "actual" and "compensatory" damages were synonymous terms. We find no such vice in the charge in this case; on the contrary, the court obeyed the suggestion contained in the *Gatzow Case*, instructing the jury that plaintiff was entitled to receive compensatory damages, consisting of injury to her reputation and to her feelings, and also, if the evidence warranted, punitory damages, aptly defined. No error was thus committed.

Numerous complaints are made of remarks and arguments addressed to the jury by the respondent's attorney. While some of these are somewhat sophistical, yet most are in the character of argument, and their unsoundness, if unsound, was rather for the opposing counsel to counteract by argument than to criticise by exception. They are all, however, of a character which might easily have been remedied had they been called to the attention of the court when made, and, inasmuch as neither objection was made to them nor the ruling of the court taken thereon, they being brought into the bill of exceptions only by affidavit upon a motion for new trial, we cannot consider them ground for reversal, even if any of them might so have been if properly excepted to. One statement of counsel did, however, receive due objection, and that was the assertion by respondent's

counsel to the jury: "A verdict for the defendant in this case means what? It means virtually that she is a whore." That was objected to, and some qualification made, still preserving the idea that in some contingencies a verdict for the defendant would be an assertion of the plaintiff's bad character. The court did not repudiate this idea upon the objection being made, only saying, "The jury will pass upon the testimony." This statement of counsel has no justification whatever. It was wholly impossible that any verdict which the jury could render would carry any implication of guilt as against the plaintiff. It was neither suggested in the answer nor in the evidence that she was other than the most virtuous, not even that the defendant had any ground whatever to doubt the plaintiff's chastity; and it certainly was unworthy of counsel high in the profession to attempt to inject so false and unfair an issue into the minds of the jury. It was an affront to the intelligence of the latter, for it is inconceivable that counsel made such statement without the hope, at least, that he might mislead them into belief that the plaintiff's virtue was in some measure on trial before them.

If the question before us were simply approval or disapproval of the conduct of the counsel, we should not hesitate as to the conclusion. That, however, is not the question, but whether it is made reasonably to appear to us that the cause of justice has been thwarted, and that the defendant has suffered prejudice. Upon careful examination of the trial and of the argument, as disclosed by the affidavits of the respective parties, and in deference to the view of the trial court, we have reached the conclusion that it does not appear that any prejudice resulted from this statement. Some assertions are so impossible, so radically opposed to known facts, that they cannot mislead, and we are inclined to think that the issue apparently attempted to be tendered by these words was so grossly and obviously false that the jury could not

have been misled to believe in it. It is deemed impossible that reasonable men, of presumptive average intelligence, who had sat and listened to this trial, where the sole and only issue was whether the defendant spoke the words charged, and where at all stages it was made apparent that the defendant made no claim that plaintiff was of bad character, or that she even believed such fact to exist, could, for a moment, have believed the counsel's statement that they had the issue of plaintiff's morality before them, or that any verdict they might render could be construed into passing upon that question. The trial court evidently reached the conclusion that these remarks were innocuous to the defendant, as he overruled a motion for a new trial.

In justice we should say that the remark above criticised did not emanate from either of the counsel who appear for the plaintiff upon the record in this court.

After a careful review of the whole case, we find no prejudicial error warranting reversal.

By the Court.—Judgment affirmed.

LAUTERBACH, Plaintiff in error, vs. NETZO, Defendant in error.

September 5—September 24, 1901.

Consolidation of actions: Justices' courts: Appeal and error: Review of taxation of costs.

1. An action appealed from justice's court and, under sec. 3768, Stats. 1898, triable in the circuit court "as actions originally brought there," may be consolidated, under sec. 2792, with an action commenced in the circuit court, notwithstanding the provisions of secs. 3766, 3770, in respect to the dismissal of the appeal if not brought to a hearing within the time there specified.

2. Where in such a case the consolidated action was brought to a hearing within the time limited by sec. 3766, the respondent could not be prejudiced by the consolidation.
3. The taxation of costs in the trial court is not reviewable by the supreme court where there was no objection or exception to any item thereof.

ERROR to review a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

For the plaintiff in error there was a brief by *C. C. Murphy*, attorney, and *Rublee A. Cole*, of counsel, and oral argument by *Mr. Cole.*

Daniel H. Grady, for the defendant in error.

CASSODAY, C. J. It appears from the record that in October, 1899, the defendant in error, *Netzo*, commenced an action against the plaintiff in error, *Mrs. Lauterbach*, in a justice's court, to recover the amount alleged to be due him on a promissory note given to him by *Mrs. Lauterbach* October 14, 1897, for $50, and interest at ten per cent. from date. The defendant therein pleaded payment, and upon the issue thus joined, and trial had before the justice, the same resulted in a verdict and judgment in favor of *Mrs. Lauterbach* and against *Netzo* of no cause of action. November 8, 1899, *Netzo* appealed from that judgment to the circuit court, and at the same time filed with the justice the requisite affidavit for a trial *de novo*, and the papers therein were all duly certified and transmitted to the circuit court, and filed with the clerk thereof November 20, 1899. October 31, 1899, *Netzo* commenced another action in the circuit court against *Mrs. Lauterbach* upon another note executed by her to him April 9, 1898, for $150, with interest at ten per cent. from April 9, 1899. The defendant therein answered that such note was fully paid. The two actions being thus at issue and pending and for trial in the circuit court, that court did, on December 5, 1899, on the motion of *Mrs. Lauterbach's* attorney, order that said two actions

be consolidated. Thereupon the two actions so consolidated were tried on the 8th and 9th of December, 1899, and upon such trial the jury disagreed. Thereafter, and on the 14th and 15th of May, 1900, said actions so consolidated were again tried by the circuit court and a jury, and at the close of the trial the jury returned a verdict in favor of *Netzo*, and assessed his damages at $221.09. To reverse the judgment entered upon that verdict, with costs, the defendant therein, *Mrs. Lauterbach*, sued out this writ of error.

Counsel for the plaintiff in error vigorously contends that the trial court was without jurisdiction to consolidate the action appealed from the justice's court with the other action. This is upon the theory that the judgment in the justice's court continued to be a valid and subsisting judgment, and *res adjudicata* between the parties upon the questions there involved, since it had not been reversed at the time of such consolidation. The reason given in support of such contention seems to be that, if neither party had brought the appeal from the justice to a hearing in the circuit court before the end of the second term after filing the return of the justice therein, then the circuit court would have been required to dismiss the appeal, unless it continued the same by special order for cause shown, as required by sec. 3766, Stats. 1898; and that, had the appeal been so dismissed, the clerk of the circuit court would have been required to "transmit all the papers in the case on said appeal to the justice," who would "thereupon proceed to enforce the collection of said judgment in the same manner as though no appeal had been taken," as prescribed by sec. 3770, Stats. 1898. The difficulty with the argument is that we have no such supposititious case in the record before us. The statute declares that such appeal from the justice "shall be tried in the appellate court, as actions originally brought there," whenever "the plaintiff appeals from a judgment against him, . . . if at the time of appealing he shall

make an affidavit that he has a valid claim, as he verily believes, against the defendant, as set forth in his complaint, exceeding the sum of fifteen dollars." Sec. 3768, subd. 2. Such affidavit was made by the plaintiff, and filed with the justice at the time of taking the appeal from the judgment rendered by the justice. The appeal from the justice was, therefore, to be tried in the circuit "court as actions originally brought there." The return of the justice was filed in the circuit court November 20, 1899, and was, therefore, pending and to be tried in that court as an action originally brought there, when, on December 5, 1899, it was, by order of that court, consolidated with the other action pending therein. Such consolidation was made by the court pursuant to the statute which declares that, "when two or more actions are pending in the same court, which might have been joined, the court or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order." Sec. 2792, Stats. 1898. There can be no question but that the cause of action on the small note "might have been joined" in the same action with the cause of action on the large note. This court has repeatedly held that the section quoted gives to the trial court discretionary power to consolidate or refuse to consolidate such actions as are therein provided for. *Blesch v. C. & N. W. R. Co.* 44 Wis. 593; *Eau Claire F. & S. Co. v. Laycock*, 92 Wis. 82. Certainly there was no abuse of discretion.

Besides, *Mrs. Lauterbach* was in no way prejudiced by such consolidation. The two actions having thus been consolidated, the appeal from the justice was brought to a hearing in the circuit court December 8, 1899, being eighteen days after the filing of the return of the justice therein, and before the end of the first term of the court after the return was so filed therein; and was again brought to a hearing and finally disposed of in the following May, and before the

end of the second term of the circuit court after the filing of the return of the justice therein.

Counsel for the plaintiff in error contends that the costs taxed are excessive. But there is no bill of exceptions. There is nothing in the record to show that the plaintiff in error objected to any item of costs, as prescribed by Circuit Court Rule XXXIII. *State v. Wertzel*, 84 Wis. 347. There being no objection nor exception to any item of costs, the taxation of costs is not reviewable by this court. *Cord v. Southwell*, 15 Wis. 211; *Perkins v. Davis*, 16 Wis. 470.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

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LAUTERBACH, Plaintiff in error, vs. NETZO, Defendant in error.

September 5—September 24, 1901.

Appeal and error: Printed case: Malicious prosecution: Evidence: Cross-examination of party: Objections: Sufficiency: Refusal to reopen case: Discretion: Court and jury.

1. Where the most important question raised on a writ of error was whether the court erred in directing a nonsuit, the printed case should contain an abstract of the evidence of all the witnesses whose testimony has a substantial bearing upon the plaintiff's contentions.
2. Where, in an action for malicious prosecution of plaintiff on the charge of disposing of mortgaged property, plaintiff testified that the mortgage debt had been paid, it was proper, on the cross-examination, to allow defendant to bring out the fact that a judgment had been rendered determining that said debt had not been paid, and to admit, as a part of the cross-examination, the record of the action in which such judgment was rendered.
3. An objection made to the introduction of a record in evidence, on the ground that the whole of it was not offered, is not available on appeal where, when asked by the trial court what parts of the

record had not been offered, appellant specified none, and where the record as offered is not brought before this court in the bill of exceptions.

4. Refusal of the trial court to reopen the case for further examination of the plaintiff with reference to a transaction between her and the defendant tending to show malice, on the ground that ample opportunity to obtain the desired information had been already given and that the attempt had been fruitless, is *held*, under the circumstances of this case, to have been a proper exercise of discretion.

5. Where the evidence is so uncertain and confused as to render the proper inferences extremely doubtful, the decision of the trial court is entitled to some weight in determining the correctness of of its ruling in taking the case from the jury.

ERROR to review a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The plaintiff in error brought action in the circuit court against the defendant in error to recover damages for alleged malicious prosecution. It appeared upon the trial in the circuit court that on the 14th of October, 1897, the plaintiff executed to the defendant a chattel mortgage covering four head of cattle to secure the payment of a note of $50; that in October, 1899, the defendant, accompanied by the undersheriff of the county, demanded from the plaintiff possession of the mortgaged cattle, and that the plaintiff refused to deliver possession of the cattle, on the ground that the mortgage had been paid. The plaintiff also testifies that at the same time she told the undersheriff that she did not have the cattle. Thereupon the defendant made complaint before a justice of the peace, and caused the arrest of the plaintiff upon a warrant charging her with selling and disposing of mortgaged property. Upon the hearing of this prosecution before the justice the plaintiff was discharged. After this discharge the defendant sued the plaintiff on the $50 note secured by the mortgage, and before the trial of the present action secured judgment against the plaintiff thereon, notwithstanding the

defense of payment which was made by the plaintiff in that action. It further appears from the evidence that in July, 1898, one Theil purchased two heifers of the plaintiff, and the evidence of the plaintiff and of Theil tends to show that before this sale the defendant had consented that the plaintiff might sell the cattle covered by the mortgage. The plaintiff claims that one of the heifers so purchased by Theil was one of the mortgaged cattle. The defendant admitted that he gave Theil permission to purchase certain cattle of the plaintiff, but that this permission did not cover any of the cattle included in the $50 mortgage, it being claimed by him that there were other mortgages which he held against the plaintiff, and that the cattle, the purchase of which he consented to, were cattle covered by another mortgage. The testimony of the plaintiff is somewhat confused, and in answer to one question upon cross-examination she practically admits that when the undersheriff came with the mortgagee she told him that she did not have the cattle; that they were sold. There was no evidence of any ill-will or differences between the parties prior to the arrest. At the close of the plaintiff's evidence a nonsuit was granted, and from judgment thereon the plaintiff sued out a writ of error.

For the plaintiff in error there was a brief by *C. C. Murphy*, attorney, and *Rublee A. Cole*, of counsel, and oral argument by *Mr. Cole.*

Daniel H. Grady, for the defendant in error.

WINSLOW, J. The printed case entirely fails to comply with Rule VIII of this court. It does not contain anything approaching a complete abstract of "so much of the record . . . as may be necessary to a full understanding of the questions presented for decision." It omits the testimony of some important witnesses entirely, and gives only isolated fragments of the testimony of other witnesses. The judg-

ment below being a judgment of nonsuit, and the most important question here raised being whether the court erred in directing a nonsuit upon the evidence, it is manifest that the case should, under the rule, contain an abstract of the evidence of all the witnesses whose testimony had a substantial bearing upon the plaintiff's contentions. Had the case been complete, or approximately so, it would have contained considerably more than twenty pages, and would, under the rule above cited, be required to contain an alphabetical index; but, owing to the fact that only fragments of the record are printed, the case contains only twenty pages, and the index has been omitted. No sufficient reason was given for these violations of rule, and we might, perhaps, be justified in refusing to consider the errors urged, but we have concluded to briefly consider them as they appear upon examination of the record, although that course has involved considerable labor which would have been unnecessary had the rule been complied with.

1. The plaintiff, as a witness on her own behalf, testified, in substance, that the mortgage in question had been paid. Upon her cross-examination the defendant was allowed to prove, against objection and exception, that an action upon the note had been brought against her by *Netzo* after the arrest and discharge, and that the action was tried and had gone to judgment at the last preceding term of the same court in which the present action was on trial. After thus having identified the action, the defendant offered in evidence as a part of the plaintiff's cross-examination the complaint in said action, the answer, the verdict, the judgment, and the note and mortgage. Upon this offer being made, the plaintiff objected, "for the reason that the whole record is not offered in evidence." Upon this the court asked, "What portion of the record is objected to as not offered?" and plaintiff's counsel replied, "Every part that is a part of the record upon such an offer we are entitled to have in

evidence in order to have the record complete." He then, without specifying what parts of the record were omitted, made a number of further objections upon the ground that there had been no proper identification of the note and mortgage or of the judgment roll, that the note and mortgage were not a part of the judgment roll, that the whole evidence was incompetent, immaterial, and not proper cross-examination, and upon other grounds not deemed essential to state. The objections were overruled, and the papers received, and these various rulings are now alleged as errors.

The general rule is that the cross-examination of a witness should ordinarily be confined to matters brought out on the direct examination, but that, in the discretion of the court a broader range of cross-examination may properly be allowed in the case of a witness who is also a party. *Sullivan v. Collins*, 107 Wis. 291. In the present case it seems to be the fact that the witness, who was also the plaintiff in the case, had testified that the note had been paid upon her direct examination, and, if this be so, then the fact that a judgment had been rendered in a court of competent jurisdiction, determining that the note had not been paid, is clearly a fact tending to directly contradict her, which may, under strict rules of evidence, be brought out on cross-examination. The objection made to the introduction of the record on the ground that the whole of it was not offered cannot be urged here. No proper ground has been laid for it. When asked by the court what parts of the record had not been offered, the counsel specified none. It was his duty to be specific when the inquiry was thus made. Had any particular paper been specified, doubtless it would have been included in the offer and received. The record, as offered, has not been presented to this court in the bill of exceptions, and hence we are unable to say that any material part of the record was not offered. The other objections made do not appear to us as of sufficient substance to merit treatment by this court.

2. Error is alleged because of a ruling of the court which was made just at the end of the plaintiff's case. The plaintiff was evidently a woman of foreign birth, who comprehended with difficulty the questions put to her, and frequently made answers which, either from design or ignorance, were not responsive to any question. She was examined and cross-examined and recalled to the stand two or three times, each examination being protracted and attended with difficulties which must have severely taxed the patience of the trial court. We are bound to say, after examination of the record, that the trial judge seems to us to have been very patient and considerate under the repeated and protracted efforts to extract information from a witness who was either perverse or hopelessly obtuse and incapable of understanding. At last, at the very close of the plaintiff's evidence, and after the case had once been rested, her counsel said that he wished to call her again for the purpose of showing by her, on the question of malice, the personal altercation which took part between *Mr. Netzo* and her before her arrest. After some conversation between court and counsel, the counsel said, "But we have been prevented all the time from showing the trouble that was had between her and this man prior to the arrest, and I think that under the rule I ought to be allowed to." In answer to this the trial judge said: "In respect to that, so the record won't be misleading, the court has given you all the opportunity that it possibly could to have the witness examined, and you tried to get answers, and she gave you none. Do not lay that to the court. It is not the court's fault if you cannot prove your case. Any further proof in this case?" To this counsel replied, "I would like the privilege of showing the transaction between the parties which took place before a witness," and the judge said, "No privilege has been denied you that you are legally entitled to," and to this remark the plaintiff excepted.

It will be noticed that counsel asked to introduce this evidence, not on the ground of oversight or unintentional omission, but on the ground that he had asked the question before and the court had erroneously sustained an objection to it. To this contention the trial judge replied, in substance, that no such ruling had been made, and that the reason why the testimony was not already in was that the plaintiff would give no answers. We have not been referred, either in the brief or in the argument, to any such ruling as the plaintiff claims, nor have we found it in the record. In this situation we must accept the statement of the trial judge as correct, and, if it be correct, we find no error. Trial judges are obliged to meet many perplexing situations, as the writer can testify from experience, and there must come times when a trial judge is justified in cutting off a long and profitless examination of a witness who, either from intention or from ignorance, fails to give any information. Such a power must, of course, be carefully guarded, and exercised only with wise discretion; but, when so exercised, the action of the trial judge will be sustained by this court. In the present case we see no reason to doubt that it was entirely proper to refuse to reopen the case for further examination of the plaintiff, on the ground that ample opportunity to obtain the desired information had been already given and that the attempt had been fruitless.

3. The nonsuit was evidently granted on the ground that malice was not shown. It is admitted by plaintiff's counsel that there was no direct evidence of malice or of any feeling of ill-will on the part of the defendant toward the plaintiff, but it is argued that there was proof of want of probable cause, and that from this malice may properly be found by the jury. It is true that malice may be inferred as a fact from the want of probable cause, though the inference is by no means a necessary one. Newell, Malicious Prosecution,

247, § 13; *Strehlow v. Pettit*, 96 Wis. 22. The question here is, Was the evidence of want of probable cause sufficient to go to the jury upon the question of malice? The trial court decided that it was not sufficient, and we are disposed, in the condition of the present record, to sustain the ruling. It is true, there was some evidence that the defendant had consented to the sale of some cattle by the plaintiff, but this evidence is at best very confused, and almost unintelligible, and apparently did not refer to the cattle named in the mortgage in question. Error must be affirmatively shown. In the case of so confused a mass of testimony as is presented to us here, where the plaintiff contradicts herself time after time upon the same page, and almost in the same breath, we must give some deference to the opinion of the trial judge as to its weight. His opportunities of forming an opinion on the subject were far better than ours can be. We are far from saying that in every case where a party makes contradictory statements a nonsuit can be sustained, but simply that, where the evidence is so uncertain and confused as to render the proper inferences extremely doubtful, as in the present case, we are disposed to give the decision of the trial judge some weight in determining the question of the correctness of the ruling. We feel more inclined to apply this rule in the present case from the fact that only detached fragments of the evidence are printed.

Upon the whole case we are of the opinion that no error has been shown.

By the Court.— Judgment affirmed.

ANDREWS and another, Appellants, vs. ROBERTSON, Respondent.

September 5 — September 24, 1901.

Contracts: Ambiguity: Parol evidence: Agency: Notice of acts: Ratification: Promissory notes: Bona fide *holder.*

1. Parol evidence is proper to explain the meaning of words used in a writing, which are ambiguous when applied to the subject which gave rise to such paper, as well as when the meaning of the writing is uncertain looking only at the language thereof.
2. A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby.
3. The holder of a promissory note, taken for him of the maker by an agent upon a condition not disclosed to such holder and outside the scope of the agency, cannot repudiate the condition and insist upon holding and enforcing the note. He is bound, if he does not intend to abide by such condition, to restore or offer to restore the note within a reasonable time after discovering the facts.
4. The general rule is that if a person, with knowledge of facts which will defeat a promissory note in the hands of the payee, purchases it from a *bona fide* holder thereof, he may recover thereon upon the strength of such *bona fides;* but that rule does not apply to a purchaser who is the payee of the note. If he sells such paper to an innocent third person and repurchases it for value, he does not thereby become possessed of any better right as against the maker than he possessed in the first instance.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action on a promissory note. The defense was that plaintiffs as agents of the Equitable Life Assurance Society of the United States, acting through their subagent, one Forsting, delivered to defendant two insurance bonds duly issued by such society, on his application made through such agents, and that he at the same time delivered to Forsting for the agents the note in suit, the same being for the down

payment for such bonds, and that the delivery was coupled with an agreement which Forsting had authority to make to the effect that defendant might, at his election to be made within thirty days, return the bonds, and in that event that the note should be delivered to defendant; that such election was made, notice thereof given to plaintiffs, a demand made upon them for the note and a tender of the bonds made to them, all within the thirty days agreed upon. The evidence was to the effect that defendant dealt with Forsting believing him to be the authorized agent of plaintiffs, received from him the bonds mentioned in the answer, and delivered to him the note in suit, receiving at the same time a writing signed by Forsting as follows:

"Received of *D. H. Robertson* note for $600 balance due on bonds Nos. B836,811 and 851,882. It it understood and agreed that should the above-numbered bonds be returned not accepted within thirty days duebill will be returned to *D. H. Robertson.*"

Forsting was in fact the duly authorized agent of plaintiffs to deliver to defendant the bonds mentioned and receive payment therefor. Evidence was given under objection that the word "duebill" in the receipt referred to the note in question. Evidence was excluded as to the authority of Forsting being limited to delivering the bonds and receiving payment therefor in cash.

Proof was made that defendant did all that was necessary on his part to entitle him to a return of his note if the writing was binding on plaintiffs, and that plaintiffs did not know of the agreement between Forsting and defendant mentioned in the receipt until after they parted with the note as hereafter mentioned; that they received the note supposing the delivery thereof to Forsting for them was unconditional, and that upon the faith thereof they paid full value for the same to the assurance society, keeping the paper as their own property; that they thereafter parted with the note for value, but discovering defendant's attitude in respect

thereto before the maturity thereof, they repurchased the paper so as to enforce it in their own names and preserve their credit; that defendant knew when he gave the note that it was negotiable and was payable to plaintiffs as principals; also that the bond, according to the contract between him and the assurance society, required payment in cash.

A verdict was rendered in favor of defendant, and judgment was rendered accordingly.

For the appellants there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.* They contended, *inter alia*, that plaintiffs are *bona fide* holders of the note. *Johnston H. Co. v. McLean*, 57 Wis. 258; *Nelson v. McDonald*, 80 Wis. 605; *Johnson v. Weed & G. Mfg. Co.* 103 Wis. 291; *Mack v. Prang*, 104 Wis. 1; *Verbeck v. Scott*, 71 Wis. 59, 64; *Kinney v. Kruse*, 28 Wis. 183; Laws of 1899, ch. 356 (sec. 1676—28); 4 Am. & Eng. Ency. of Law (2d ed.), 330, 332, 333. There was a delivery of the note. *Lyle v. McCormick H. M. Co.* 108 Wis. 81; *Rehbein v. Rahr*, 109 Wis. 136; *Nutting v. Minn. F. Ins. Co.* 98 Wis. 26; *Thorn v. Ætna Ins. Co.* 102 Wis. 593, 596; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194; *Davis v. McCready*, 17 N. Y. 230; Daniel, Neg. Inst. § 156; Tiedeman, Comm. Paper, § 40; 4 Am. & Eng. Ency. of Law, 144; *Brinker v. Meyer*, 81 Wis. 33, 35.

H. W. Chynoweth, for the respondent.

MARSHALL, J. The view we take of this case renders it unnecessary to consider the question of whether the instrument sued on ever became the promissory note of respondent. Conceding that it did, it is not enforceable in the hands of plaintiffs if the condition on which it was delivered to their agent, Forsting, is binding upon them, upon the ground that they are not *bona fide* holders of the paper. What that condition was is too clear for controversy. It was competent to show that the word "duebill," found in

the receipt given by Forsting, referred to the note, upon the plainest principles of evidence; so there can be no question but that the delivery of the note was made upon condition that if respondent elected to and did return the bonds as not satisfactory, within thirty days, it should be delivered back to him.

It is said appellants became the *bona fide* holders of the note because they paid full value therefor to their principal without notice of the condition upon which it was taken for them by Forsting. True, they did not have actual notice of such condition, but by well-settled principles of law they had constructive notice, if what Forsting did was within the actual or apparent scope of his agency; and if it was not, they are chargeable just the same and are bound accordingly, because they insisted on reaping the benefit of his transaction after having knowledge of the facts. Upon receiving such knowledge, if they did not intend to ratify such transaction, they should have promptly repudiated it and offered to return the note. *McDermott v. Jackson*, 97 Wis. 64; *Wilson v. Groelle*, 83 Wis. 530; *Perkins v. Boothby*, 71 Me. 91; *First Nat. Bank v. Oberne*, 121 Ill. 25; Mechem, Agency, § 167.

The further claim is made that plaintiffs are *bona fide* holders of the paper because they purchased it from their indorsee, who was an innocent holder thereof, paying full value therefor, and that the trial court erred in refusing to permit proof of such repurchase for value. In that, they invoke the familiar common-law rule, which has recently been added to the statute law of the state, sec. 1676—28, ch. 356, Laws of 1899, that the holder of commercial paper may recover on the strength of the title of a precedent innocent holder, regardless of knowledge on his part of fraud which would defeat it in the hands of the payee named therein. *Verbeck v. Scott*, 71 Wis. 59, 64. That rule is stated in the books, particularly in judicial opinions, generally in such a

way as to lead one astray who is not familiar with the law on the subject, as to the extent of its application. It is not a universal rule. It does not apply to a case like this, where the payee of the paper, being so circumstanced at the start that he cannot recover thereon, transfers it to an innocent third party for value and subsequently purchases it back for value. Under such circumstances the payee cannot lean for support on the innocence of his vendee. His position is the same when he comes into possession of the paper the second time as when he first possessed it. One would say that must be the law without reference to authority; otherwise a person might become possessed of a promissory note of another by the grossest of frauds and by selling it to an innocent third person for value and subsequently repurchasing it enforce the same against the maker. The law contains no such open door as that for the successful perpetration of fraud. *Tod v. Wick Brothers & Co.* 36 Ohio St. 370; *Sawyer v. Wiswell*, 9 Allen, 39; *Kost v. Bender*, 25 Mich. 518; *Vorce v. Rosenbery*, 12 Neb. 448; *Chariton Plow Co. v. Davidson*, 16 Neb. 374; *Camp v. Sturdevant*, 16 Neb. 693. We are unable to find that the rule contended for by appellants has ever been applied to a case like this. If authority to that effect could be found, we would be compelled to reject it as out of harmony with the settled law on the subject and contrary to every principle of justice upon which the law is founded.

By the Court.—The judgment of the circuit court is affirmed.

DEERING and others, Appellants, vs. HOEFT, Respondent.

111 339
116 413

September 5 — September 24, 1901.

Fraud: Misrepresenting contents of writing: Evidence: Court and jury.

In an action upon a written order for the purchase of a self-binder, given by a farmer unable to read English, the evidence — stated in the opinion — is *held* not sufficiently strong and cogent to sustain a finding of the jury that the vendor's agent misrepresented the contents of the order to the vendee.

APPEAL from a judgment of the circuit court for Marquette county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The plaintiffs sue to recover the price of a self-binder. The action is based upon a written order dated June 14, 1900, addressed to Hamilton Bros., as the agents of plaintiffs. It is signed by the defendant with his mark and calls for "one Ideal binder, complete." The machine was warranted to be well made, of good materials, and, with proper care and management, durable and capable of doing good work. The purchaser was to have one day to give it a fair trial, and if it did not work well written notice was to be given to the agent from whom purchased, or to some general agent of the company, and a reasonable time allowed to repair it. If it failed to work it was to be returned and a new machine taken or the purchase price refunded. Defendant was to pay $105 cash and an old reaper. The complaint alleges the machine was delivered about July 1, 1900, and has not been paid for. The answer denied ever having signed any contract for the purchase of the binder. It was alleged that plaintiff's agent came to him in the month of June, 1900, and represented that he desired to sell one of the latest and most approved of their new machines, and that, if the defendant would take one, if it suited him he might keep it and pay for it, but if it did not he might re-

turn it at any time. Relying on these representations, he was induced to take a binder. The agent produced a paper for defendant to sign, and represented that it was an order for a machine on the terms stated. The defendant is a German and cannot read English. The writing was not read to or explained to him, and he did not understand the contents thereof. Relying upon these representations, he signed the paper, and received a machine. Before he left the village of Westfield, where delivery was made, he discovered that the machine was not a new one; that it was old style, weather-beaten, and not the latest improved machine. He refused to keep the machine, and returned it to plaintiffs' agents the same day. He offered to take a new machine, but this was refused.

A jury trial was had, and a special verdict rendered as follows:

"Was it understood and agreed between *Mr. Hoeft*, the defendant, and Mr. Percy, the plaintiff's agent, at the time the written contract was signed, that *Mr. Hoeft* might take the machine and keep it if satisfied with it, and if he was not satisfied with it he could return it at any time and need not pay for it? *A.* Yes. *Q.* If your answer to the first question is 'Yes,' then answer this question: Did Mr. Percy, the plaintiff's agent, falsely represent to *Mr. Hoeft*, when the contract was made in writing and read to defendant, that it contained the agreement and stipulation as specified and set out in question No. 1? *A.* Yes. *Q.* Was *Mr. Hoeft*, the defendant, induced to sign the written contract offered in evidence and purchase a machine upon the ground that he believed and understood it contained a stipulation as specified and set out in question No. 1? *A.* Yes."

The plaintiffs' evidence showed that the order mentioned was signed by defendant after it had been correctly read to him, and a copy thereof given to him; that about June 27th the defendant called for the machine, which was loaded in his wagon, and taken away. The machine so delivered was a Deering Ideal of the make of 1899. The defendant's

testimony as to what occurred at the signing of the contract is as follows:

"I can't read English. I am the defendant in this case. I signed a paper that day. He told me what the paper was. He said that was a new binder he sold me; a new binder. He said he sell me a new binder what make me satisfied. I take it out if he don't. I don't care. I told him if I had it on my wagon or on my farm, if I don't like it I took it back to him. He said: 'All right, bring it any time. If you don't like it you shan't take it. I make you satisfied.' *Q.* State whether or not that is what he said that writing contained. (Objected to as leading.) *Court:* He may answer that. Did he say that was in the paper? *A.* I don't understand. *Q.* Did this man Percy say that was in this paper? *A.* Yes, sir."

He admitted that the agent read the whole paper to him and gave him a copy. He claimed the machine was delivered to him the Wednesday after the contract was signed; that it was hurriedly loaded into his wagon, and he drove away a few rods, when some of his neighbors called his attention to the machine. He looked it over, and found it was rusty, weather-beaten, and the paint was coming off in places. He drove back to the agent's warehouse and demanded a new machine, which was refused unless he paid an advanced price. He unloaded and left the machine. The testimony of other witnesses was to the effect that the machine was somewhat rusty and the paint was faded and weather-worn.

After the verdict was rendered, plaintiffs moved for judgment. The motion was denied. They then made a motion for a new trial on the ground that the verdict was contrary to the law and the evidence, and for misdirection of the jury. This motion was also denied, and a motion for judgment for defendant was granted. These orders were duly excepted to. The plaintiffs appealed from the judgment in favor of defendant for costs.

For the appellants there was a brief by *Erdall & Swansen*, and oral argument by *Sam. T. Swansen.*

Daniel H. Grady, for the respondent.

BARDEEN, J. This action is based upon a written order signed by the defendant for the purchase of an Ideal binder, manufactured by the plaintiffs. The defense is that the defendant was induced to sign said order upon the representation of plaintiffs' agent that it was in accord with a verbal agreement to the effect that defendant might take the machine and keep it if satisfied with it, and if not satisfied with it he could return it at any time and not pay for it. The jury found the issue for defendant as stated in the special verdict, and this finding is now challenged on the ground that the fraud alleged and found to have been perpetrated on the defendant by the misreading of the order was not established by that degree of proof that the law requires.

The facts are not numerous or complicated. The plaintiffs' agent claims, and the defendant admits, that after they had their talk about the sale and purchase of the machine the written order was drawn up, was read to defendant by the agent at length, and then signed, and a copy of the order was delivered to defendant. The agent testifies that he read the order to him correctly. The defendant admits the whole order was read to him, but he claims that he cannot read English, and that he was deceived as to the contents of the order signed. His testimony as to the fact of deception is very meager and unsatisfactory. He does not claim that he misunderstood what was read to him. He does not testify, except in an indirect way, that his version of what the contract was was read to him by the agent. After reciting the talk had with the agent, and giving his understanding of the verbal contract, he was asked by his counsel to state whether or not that is what he (the agent) said the writing contained. To this he answered that he did not understand. He was then asked, "Did this man Percy say that was in this paper?" The answer was, "Yes, sir." This is all the testimony given by him to the effect that the order was misread to him. On the one side we have a solemn written in-

strument, setting out at length the exact engagement of the parties. We have the testimony of the agent that he read the entire order to the defendant, who understood English, and who could talk with some degree of volubility; that he read it correctly and as written. We have also the admission of the defendant that the order was read to him, and no claim on his part that he did not understand what was read to him. Opposed to this we have merely the meager and unsatisfactory statement of the defendant, set out at length in the statement of facts and referred to above.

In absence of fraud or imposition, a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained. *Sanger v. Dun*, 47 Wis. 615; *Albrecht v. M. & S. R. Co.* 87 Wis. 105; *Jackowski v. Illinois S. Co.* 103 Wis. 448; *McGowan v. Supreme Court I. O. F.* 107 Wis. 462. Here it was claimed there was fraud and imposition, but it is based upon testimony of such loose and flimsy character as that, if the written order stood alone, one would hesitate to turn the scale in defendant's favor. The evidence of plaintiffs' agent, although a somewhat interested party, is entitled to some weight. He is corroborated in the fact that the entire contract was read to defendant, and by the further fact that the defendant does not claim he misunderstood what was read to him. His only claim is that the agent told him that their verbal talk was embodied in the written order. The general rule is that fraud and imposition must be shown by clear and satisfactory evidence. The amount or weight of proof sufficient to show it is not a matter of exact legal definition. The proof, however, must be so strong and cogent as to satisfy a man of sound judgment of the truth of the claim. Bump, Fraudulent Conveyances, § 619. We disturb the finding of the jury with some reluctance, but we cannot persuade ourselves that the evidence in this case fulfills the requirements of

the law. It falls very much short of being so clear and satisfactory as to overcome the evidence against it.

The question of whether the delivery of a machine of the make and in the condition this was when delivered was a compliance with the requirements of the written order was not litigated on the trial, and cannot now be considered.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

GRISWOLD, Appellant, vs. NICHOLS, Respondent.

September 5 — September 24, 1901.

Justices' courts: Replevin: Sheriff a party: Service by coroner: Jurisdiction: Voluntary appearance.

1. Under sec. 4972, Stats. 1898 (providing that if the provisions of different chapters conflict those of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter), the provision of sec. 3737, in the chapter relating to replevin in justice's court, that where the sheriff is a party the warrant and all process in the cause shall be awarded to and executed by a constable, must prevail over more general provisions in other chapters requiring the coroner to serve process and perform all the duties of sheriff when the latter is a party; and, the provision being mandatory, the justice acquires no jurisdiction in a replevin action from service of process by the coroner.
2. Issuance of the warrant to, and execution of it by, the coroner in such a case merely defeats the jurisdiction of the person; and the defect is waived by the voluntary appearance of the defendant.

APPEAL from an order of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action of replevin in justice's court against the sheriff. The warrant was issued, delivered to, and executed by the coroner, who seized the property, and served upon the defendant. The latter appeared specially in the justice's court, and moved to dismiss for want of jurisdiction, upon the over-

ruling of which motion he appeared generally, demanded security for costs, answered, and participated in the trial. From judgment in plaintiff's favor defendant appealed to circuit court, where he renewed his motion to dismiss for want of jurisdiction, which was granted and order of dismissal entered, from which plaintiff appeals.

The cause was submitted for the appellant on the brief of *Daniel Ruggles*, and for the respondent on that of *F. R. Bentley*.

To the point that the justice was without jurisdiction, counsel for the respondent cited *Steen v. Norton*, 45 Wis. 412, 416, 417, 419; *Detroit S. Co. v. Kelly*, 78 Wis. 134; *Sheridan v. Ireland*, 66 Me. 138; *Martin v. Darling*, 78 Me. 78; *Bell v. Olmsted*, 18 Wis. 71; *Union M. F. Ins. Co. v. Page*, 61 Mich. 72; *Rasch v. Moore*, 57 Mich. 54; *Maguire v. Bolan*, 94 Wis. 52; *Morrison v. Fake*, 1 Pin. 133; *Slaughter v. Bevans*, 1 Pin. 348; *Appeal of Royston*, 53 Wis. 612.

DODGE, J. Two questions are presented upon this appeal: First. Can warrant in replevin in justice's court be awarded to and executed by the coroner when the sheriff is a party? Second. If not, can defendant effectively waive objection thereto, and confer jurisdiction?

1. Sec. 737, Stats. 1898, relating to the duties of county officers, provides that the "coroner shall serve and execute process of every kind . . . when the sheriff shall be a party to the action." Sec. 2826, in title XXV, "Proceedings in Civil Actions in Courts of Record," provides that the coroner shall be bound to perform all services by that section imposed on the sheriff, as he is already bound to execute process when the sheriff is a party. Sec. 3737, in the chapter relating to replevin before justices of the peace, provides:

"Whenever such action shall be brought by or against the sheriff of any county the warrant and all process in the

cause shall be awarded to and executed by any constable of the county."

Of these statutes we can have no doubt that the last must control the situation now before us, in deference to the provision of sec. 4972, that, "If the provisions of different chapters of these statutes conflict with or contravene each other the provisions of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter." This statute but states a well-established rule of construction, long recognized by the courts. Under it, clearly, sec. 3737, in the chapter relating to replevin in justice's court, must prevail over the more general ones in that kind of action. *Cron v. Krones*, 17 Wis. 401. That section is mandatory in form, not merely permissive. It commands that the process *shall* be awarded to and executed by a constable. That statute not being complied with in the present case, clearly the justice's court acquired from its issue and service no jurisdiction of the case.

2. But it is contended that such want of jurisdiction was conferred by the voluntary act of defendant in appearing, answering, and demanding security for costs. Doubtless, such acts sufficed to waive the defect, if that was in the defendant's power. *Lowe v. Stringham*, 14 Wis. 222. That depends upon whether the irregularity in the form and service of the warrant defeats the jurisdiction of the justice over the subject matter, or merely over the person of the defendant. It is well settled that the former class of defects cannot be cured, and may be availed of at any time (*Detroit S. Co. v. Kelly*, 78 Wis. 134); while the latter — those which go only to jurisdiction over the person — are subject to waiver by the party (*Bell v. Olmsted*, 18 Wis. 69; *Gilbert-Arnold L. Co. v. O'Hare*, 93 Wis. 194).

Respondent cites to us numerous cases in Wisconsin in which the jurisdiction, especially of justices of the peace in actions proceeding substantially *in rem*, such as attachment,

garnishment, and replevin, has been held not aroused by reason of failure to comply with certain statutory prerequisites. *Steen v. Norton*, 45 Wis. 412; *Detroit S. Co. v. Kelly*, *supra*. An examination of these cases discloses that the failure to comply with statutory requirements in each case was in the affidavit required to be filed before process issued, and such failure, at least in inferior courts, was held to defeat jurisdiction over the subject matter and be incapable of waiver or cure. It is argued that the issue and due execution of prescribed process is just as obviously a statutory condition of the magistrate's jurisdiction over the subject matter, and some authorities from text-books and other states are cited to this proposition, which certainly is supported by much reason; but we find the other view quite firmly established by earlier decisions of this court. Thus, in *Lowe v. Stringham*, *supra*, which was replevin before a justice, the warrant failed to comply with the statutory requirement as to the length of time before it was returnable, but it was held that the defect was cured by the conduct of the defendant in entering his appearance, pleading, and going to trial; thus, while the distinction was not drawn in words, holding by the clearest implication that the defect affected only the jurisdiction over the person. Again, in *Krueger v. Pierce*, 37 Wis. 269, also replevin in justice's court, where the goods were in the custody of a deputy sheriff, the warrant was issued to and executed by the sheriff. This was held to conflict with the statute, but to be cured by voluntary appearance of the defendant. The court says, "At most, the service by the sheriff upon the deputy was only an irregularity which might be waived, and which we think was fully waived, by the defendant. The defect in the service is not a matter which went to the jurisdiction of the court over the cause of action, but only to its jurisdiction over the person."

In the light of so direct authority, standing for so many

years without criticism, we cannot feel justified in departing from the construction and force then ascribed by this court to the statute under consideration. In deference thereto, we must hold that the erroneous issue and execution of the warrant in this case could be and was cured by the voluntary acts of the defendant, and the lacking jurisdiction over his person thereby conferred. The action should not have been dismissed.

By the Court.— The order appealed from is reversed, and the cause remanded for further proceedings according to law.

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117 s 49
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s117 427

COLLINS, by guardian *ad litem*, Respondent, vs. THE CITY OF JANESVILLE, Appellant.

September 6 — September 24, 1901.

Municipal corporations: Injury from defective sidewalk: Evidence: Immaterial errors: Experts: Hypothetical questions: Leading questions: Use of sidewalk for play: Presumption as to safe condition: Knowledge of defects: Instructions to jury: Damages: Res judicata: *Appeal: Taxation of costs.*

1. In an action against a city to recover for injuries to plaintiff's leg near the ankle, alleged to have been caused by a defect in the sidewalk, a witness who had observed the manner in which plaintiff used her foot in walking after recovery, although not an expert, may testify as to what he saw regarding such use.
2. In such a case testimony of a witness that he knew at what place in the sidewalk it was claimed plaintiff was injured is immaterial, but its admission, in view of the other evidence, is *held* not to have been prejudicial.
3. Where an objection to evidence is properly made the trial court should decide the question presented according to principles of law as it understands them, and should not admit the evidence because counsel is willing to take his chances of reversal on appeal.
4. One of plaintiff's expert witnesses, who had testified to finding some chronic inflammation in the ankle joint was asked if there was usually a recovery from inflammation in the joint within six years,

counsel stating in effect that he was speaking with reference to such a case as the one under discussion. *Held*, that an objection on the ground that the question did not call for an opinion based on such a case as the one under investigation, was improperly sustained.

5. The claim being made by defendant that the accident happened by reason of the plaintiff falling from a fence, one of defendant's witnesses was asked a direct question as to whether she did not see the accident happen in that way. On a general objection the question was ruled out. *Held*, that the ruling was proper, the question being leading.

6. The refusal to give an instruction requested is not error where it is given in substance in the general charge.

7. An instruction to the effect that if a child, while using the sidewalk in going from one place to another, incidentally indulges in some play or pastime, but is not thereby diverted from going straight to her destination, she is a traveler in the eye of the law, and that if plaintiff was using the walk in going directly from her home to a neighbor's, as she claims, and at the same time was accompanied by children who were playing, but she did not stop to play with them, or if she was engaged in any pastime incidentally but was not thereby diverted from going straight to her destination, she was a traveler, is *held* not to have been erroneous, especially where followed by an instruction that "if, on the other hand, you believe and find that she started from her home to her neighbor's and was diverted from this purpose and stopped to play with other children, and she was injured on the sidewalk while engaged in playing, she cannot recover."

8. If a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent; but the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of the plaintiff's contributory negligence.

9. Where the plaintiff in an action to recover for injuries caused by a defective sidewalk knew of the defect, the error in giving instructions applicable to a case where such knowledge was wanting is *held* not to have been cured by an instruction that if a person knows of a dangerous defect in the sidewalk he must use greater care than if he is ignorant thereof.

10. A decision as to the amount of damages recoverable on a given state of facts in a particular case, when once rendered in the supreme

court is *res judicata* and absolutely controlling in such case, the same as a decision upon any other question.

11. No direction as to the taxation of costs having been given when a case was decided, the clerk properly refused to pass upon the questions whether the printed case was made up in compliance with the rules and whether a reply brief was necessary.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action to recover for personal injuries said to have been caused by a defective sidewalk. The defense covered all the material facts alleged in the complaint except the fact that plaintiff received an injury. It was claimed by defendant, among other things, that the injury was caused by a fall from a fence; also that the injury was attributable to contributory negligence on the part of plaintiff. There was evidence to establish the material allegations of the complaint, and evidence to go to the jury on the question of where the injury occurred, the nature of it, and the subject of contributory fault on plaintiff's part. The defect in the walk, the nature of the injury and its effect, which the evidence established or tended to establish, were as follows:

There was a hole in the sidewalk large enough to admit plaintiff's foot. The hole had existed for a considerable length of time to the knowledge of defendant and plaintiff as well. Plaintiff was traveling on the sidewalk about 8 o'clock in the evening in June, 1895, and while so traveling her foot went into the hole, causing her to fall and break the small bone of her leg a little above the ankle joint; also to strain and injure the ligaments, muscles, and tendons of the leg and ankle at or near the point of the fracture. As a result of the injury plaintiff was confined to her bed about a month, was thereafter for about a month obliged to be carried when she moved about, and thereafter for about two and one-half months she was obliged to use a crutch or cane in walking. She suffered considerable pain. The use of the

injured limb and foot has been restored except that plaintiff limps slightly, suffers some pain in damp weather, cannot use the limb as freely as formerly in walking up and down stairs or in dancing, the use of the limb by walking or standing for a considerable length of time causes some pain and some swelling of the ankle, and there is some chronic inflammation of the ligaments of the ankle joint and some enlargement of the tissues at that point, causing some tenderness and slight loss of motion of the ankle and foot.

Plaintiff was about fourteen years of age when she received the injury. The jury found in her favor in the sum of $2,800, for which judgment was rendered with costs.

F. C. Burpee, city attorney, for the appellant.

J. J. Cunningham, for the respondent.

MARSHALL, J. A witness who had observed the manner in which respondent used her foot in walking after she recovered from her injury, so far as recovery had taken place up to the time of the trial, was permitted against objection by appellant's counsel to answer a question as to what she saw regarding such use. That is assigned as error upon the ground that the witness was not an expert. We fail to see anything in the question to suggest that it called for opinion evidence of any kind. The answer that the witness gave was not responsive to the question and possibly was objectionable, but no motion was made to strike it out, so no error can be considered except as to the question itself. It was certainly competent for any one who had seen the girl walk to state how she handled her foot, whether she limped or favored it in any way, and that was the sole nature of the information called for by the question objected to.

A witness for respondent was permitted to testify that he knew at what place on the walk it was claimed she was injured and to state the place. The meaning of the question

is not clear. It may have been directed to whether the witness knew where respondent claimed she was injured at or about the time he observed the defect in the sidewalk, or that he knew where she claimed on the trial the injury took place, or that he knew where she was reputed to have received the injury. In either event the evidence does not seem competent. But in view of the other evidence in the case we are not prepared to say it was prejudicial. The better way was to sustain the objection. Whether the witness knew where respondent or any one else claimed she was injured was not material to the case or to the witness's competency to testify in regard to the existence of the defect, which was the real purpose for which he was called.

A physician who testified as an expert was permitted to give his opinion, on the theory that there was evidence in the case tending to prove that respondent's injury included a strain of the ligaments of her limb extending from the place of the bone fracture down to the heel. As we read the evidence the assumption was well grounded. Dr. Pember, who treated the injured limb, testified that the fracture of the small bone of the leg was accompanied by a straining of the ligaments and other injuries that are characteristic of fractures about or near the ankle joint and also below that point. Dr. Harper testified that upon examination of the girl's foot he found that an abnormal condition of the ligaments existed about the ankle joint and at the upper portion of the heel bone. There is other evidence fully justifying the assumption complained of.

A long and somewhat indefinite question to one of the experts called by respondent was condemned by the court. Nevertheless, on respondent's counsel pressing for permission to have it answered, permission was granted, the circuit judge indicating that he was still of the opinion that the question was so indefinite as to be objectionable, but said that it might be answered at the risk of counsel. In

Boltz v. Sullivan, 101 Wis. 608, this court took occasion to criticise that method of dealing with a judicial question. We reaffirm what was there said. When an objection to evidence is properly made upon a trial it should be considered and the question presented decided according to the right of the matter as the court understands it. It is highly improper to decide such a question regardless of principles of law merely because counsel is willing to take his chances upon the reviewing court upholding his view. Such a decision has no element in it of judicial determination which appellate courts are created to review. It contains merely the judgment of the favored attorney, though in form it is the judgment of the court. In regard to the question itself we shall not spend much time. In our judgment it might have been made more concise. It is far from being a model, yet we are not prepared to say that it was prejudicially indefinite or that it contained any assumption which could not be referred to evidence in the case which the jury had a right to believe. It was evidently well understood by the witness. In that view we must hold that there was no reversible error committed in permitting it to be answered.

For the purpose of testing the weight that should be given to the evidence of one of the physicians who gave opinion evidence in favor of respondent, and who said that he discovered on an examination of her foot that there was some chronic inflammation in the ankle joint, he was asked if there was usually a recovery as to inflammation in the joint within six years' time, counsel stating, in effect, to the court and the witness that he was speaking with reference to such a case as the one under investigation. A general objection to the question was sustained upon the ground that it did not call for an opinion based on such a case as the one made by the evidence. That was clearly wrong, because counsel said distinctly that he referred in his ques-

tion to such a case. The witness should have been permitted to answer.

For the purpose of showing that respondent received her injury by falling from a fence at or about the line of the sidewalk, one of appellant's witnesses was asked a direct question as to whether she did not see the accident happen that way. Upon a general objection thereto the question was ruled out, no reason being assigned therefor. The ruling was proper on the ground that the question was leading.

Several exceptions to refusals to instruct the jury as requested by appellant's counsel are called to our attention. It does not appear necessary to refer to them in detail. All the refused instructions, so far as material, seem to have been given in substance in the general charge.

The court instructed the jury that 'if a child, while using the sidewalk in going from one place to another, incidentally indulges in some pastime or play, but is not thereby diverted from going straight to her destination, she is a traveler in the eye of the law, and that if respondent was using the walk in going directly from her home to a neighbor's, as she claims, and at the same time she was accompanied by children who were playing, but she did not stop to play with them, or if she was engaged in any pastime incidentally but was not thereby diverted from going straight to her destination, she was a traveler.' That is claimed to be an erroneous statement of the law. It is clear that the purpose was to instruct the jury in accordance with the rule laid down in *Reed v. Madison*, 83 Wis. 171, where the court said, in effect, that if a child, in using a sidewalk to go from place to place, incidentally rolls her hoop as she walks along, she is nevertheless a traveler and entitled to the protection of the law as regards the duty of a municipality to keep its sidewalks in a reasonably safe condition. Appellant's counsel says the language of the court was not sufficiently clear to prevent the jury from getting the idea that a child, while

journeying upon a sidewalk, may incidentally stop to play without losing her character as a traveler. The reason for that contention is not perceived by the most careful reading of the instruction complained of, especially in view of the fact that following the instruction the court said: "If, on the other hand, you believe and find that she started from her home to her neighbor's and was diverted from this purpose and stopped to play with other children, and she was injured on the sidewalk while engaged in playing, she cannot recover."

The court further instructed the jury that, "Persons walking on a sidewalk have a right to presume that it is in a reasonably safe condition for travel, and the traveler is not called upon to look especially as to whether such walk is in a sufficiently safe condition and properly maintained or not; and so ordinary care on the part of a traveler is presumed upon this ground." It being undisputed that respondent knew of the defect before the accident, that instruction was clearly erroneous and prejudicially misleading. The same instruction was given upon the former trial, and was condemned in unmistakable language. *Collins v. Janesville*, 107 Wis. 436. No good reason is perceived why it was repeated. The idea that a person with knowledge of a dangerous defect in a sidewalk can use it regardless thereof, that is, with the presumption that there is no such defect, is erroneous to a high degree. The better way was to omit the instruction. Having given it, the court should have stated that it did not apply to the facts of this case because respondent knew of the defect; that such circumstance displaced the presumption that would otherwise exist in her favor and required some evidence, direct or circumstantial, reasonably sufficient to overcome the presumption of negligence raised by such knowledge, by showing that she was proceeding upon the walk paying attention to the necessity of avoiding the danger, or that she forgot the existence of

it and that her forgetfulness under the circumstances was consistent with ordinary care. Some courts have held that if a person knows of a dangerous defect in a sidewalk he is bound at his peril to remember it. *Gilman v. Deerfield*, 15 Gray, 577; *Bruker v. Covington*, 69 Ind. 35. But this court, in harmony with the weight of authority, holds to the more reasonable and humane rule that a person may forget the existence of a defect in a street or sidewalk and thereby receive a personal injury, and yet be in the exercise of ordinary care. *Cuthbert v. Appleton*, 24 Wis. 383; *Wheeler v. Westport*, 30 Wis. 392; *Simonds v. Baraboo*, 93 Wis. 40; *Crites v. New Richmond*, 98 Wis. 55. An examination of those cases will show that the law is that if a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent, but that the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of the plaintiff's contributory negligence.

In *Wheeler v. Westport* there was proof that the injury happened on a dark night and that the injured person was a physician on his way to attend a patient; that he was familiar with the defect, but was engaged in conversation with the messenger who summoned him, by reason whereof, in momentary forgetfulness of the known danger, he collided with it. Under those circumstances it was held that the jury were justified in saying that the failure to remember was consistent with ordinary care. In *Crites v. New Richmond*, the proof was that as the injured person was traveling upon the sidewalk an acquaintance called to him from the opposite side of the street; that his attention was thereby diverted from the walk upon which he was traveling, by reason whereof he stepped into a hole in the walk, with which he was familiar, and which was in plain sight, and

was injured. In *Cumisky v. Kenosha*, 87 Wis. 286, plaintiff fell over a dangerous ridge of ice on a sidewalk. She knew of the obstruction and had passed over it but a few hours before. When the accident happened she was hurrying along to avoid meeting a large number of workmen who had just stopped work for the day and were about to leave the shop to go to their homes. She was a nervous, timid woman. The desire to avoid meeting the men engrossed her thoughts and diverted her attention from the walk. Just before arriving at the obstruction she looked in the direction of the men to see if they were coming. Such circumstances were deemed sufficient to carry the case to the jury, notwithstanding the woman's knowledge of the dangerous condition of the walk. "Such facts and circumstances," said the court, "have often been held by this court to destroy the effect of the plaintiff's previous knowledge of the defect as the ground of contributory negligence, and repel the presumption of negligence from the plaintiff's previous notice and knowledge of the obstruction, and that the jury might properly so consider them."

Enough has been said to demonstrate clearly the erroneous character of the instruction above considered. We might have rested the decision in regard thereto on what was said upon the former appeal. In view of that decision, as before indicated, the instruction should not have been repeated. Probably the trial court supposed that it was rendered harmless by coupling with it an instruction to the effect that if a person knows of a dangerous defect in a sidewalk he must use greater care than if he is ignorant thereof. Counsel for respondent seeks to sustain the instruction on that theory. The added statement left unimpaired the erroneous instruction, for the jury were still left to be guided by the idea that, notwithstanding respondent's knowledge of the defect, she yet had a right to presume that the walk was in a reasonably safe condition for her use

and might recover without any evidence whatever to excuse her for not remembering and avoiding it.

On the former appeal a verdict of $1,700 was held excessive. Counsel for appellant, by reference to that, insists that the present judgment of $2,800 for damages must be reversed. To sustain it, the claim is made that the evidence in the record before us is substantially different from that formerly reviewed. A careful reading and comparison of the evidence in the two records fails to sustain that view. The evidence of respondent on the last trial is substantially identical with that given by her before. More evidence was given on the last trial corroborative of her testimony than was given before, but that does not count for much, as the former decision was made upon the theory that the jury had a right to believe the plaintiff's story as to the effect of the injury, to its fullest extent. A greater number of experts were sworn on the last trial than on the trial which preceded it, but the increase upon the one side was balanced by a corresponding increase upon the other. The nature of the expert evidence is substantially as before. On the whole the situation is this: Respondent suffered a simple fracture of the small bone of the left leg near the ankle joint, with a straining of the ligaments necessarily characteristic of such an injury. There was a recovery from the injury in the usual course of events so that respondent has regained the full use of her limb except as to some slight impairment that does not and will not seriously interfere with her power to earn money and take care of herself or with her comfort and enjoyment. She has a slight limp, not easily perceptible unless one's attention is called particularly to it. She has some pain at times in the region of the ankle joint in damp or rainy weather, but none of any serious nature. The same is true in case she stands on her feet all day. There is a tendency of the joint to swell on such occasions. She experiences no difficulty with her foot

otherwise than as stated, except when she steps backward. Then there is a slight drawing of the muscles around the ankle. There is no evidence of the injury now that can be readily discovered by merely observing the foot and limb at and near the fracture and by comparing them with the other foot and limb, though there is some thickening of the ligaments and some chronic inflammation in the joint, such as is liable to exist in such cases. The clear weight of the expert testimony is to the effect that the girl now has and will continue to have substantially the full use of her foot, though some tenderness and weakness has been and will be experienced in damp weather, when the foot is subjected to hard usage, and slightly at other times. For the injury thus described the jury gives a verdict equivalent to an annuity of $200 per year for the full period of the girl's expectancy of life. If, under any circumstances, such a recovery could be sustained, it cannot in this case in view of the former decision. A decision as to the amount of damages recoverable on a given state of facts in a particular case, when once rendered in this court, is *res adjudicata* and absolutely controlling in such case the same as a decision upon any other question. A verdict for more than the amount once held erroneous because excessive cannot thereafter be held good upon the same or substantially the same evidence because sanctioned by a second or any number of juries. Otherwise all that would be necessary to secure the success of a perverse verdict would be to have the mischief of it sanctioned by a second jury.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

This case was decided September 24, 1901. No direction was given in the opinion as to the taxation of costs. Objection was made before the clerk to costs in appellant's favor for printing a considerable part of the case and for

printing a reply brief. It was claimed that unnecessary matter was included in the case in violation of the rules on that subject, and that the reply brief, so called, was not such in fact and was entirely unnecessary. The objections were overruled. A motion was made for a retaxation of costs upon the ground that the clerk erred in deciding upon the objections mentioned.

Geo. G. Sutherland, for the motion.

F. C. Burpee, contra.

The following opinion was filed November 29, 1901;

MARSHALL, J. No directions having been given to the clerk when the case was decided, as to whether the successful party should be allowed full costs for printing the case and costs for the reply brief, the clerk, under the rule established in *Fairbank v. Newton*, 48 Wis. 384, properly refused to pass upon the question of whether such case was made up in compliance with the court rules, or whether the reply brief was necessary. It was there said that, "In all cases where no direction is given to the clerk when the case is decided, in respect to the taxation for printing cases and briefs, he will tax for such disbursements according to the established rules;" and the court held that, in such circumstances, error in allowing for unnecessary printing is error of the court in not giving the clerk directions at the time of deciding the case, which cannot be reached by a motion for a review of the taxation of costs, but must be corrected, if at all, by a motion to correct the judgment, which, obviously, would be in the nature of a motion for a rehearing. The case to which we have referred is decisive of this question. The clerk followed what was impliedly the decision of the court as to allowing the successful party costs for printing. There are cases where the ruling of the clerk on objections to the allowance of disbursements for printing cases and briefs has been overruled on a motion for a re-

taxation of costs. See *Baker v. Madison*, 62 Wis. 152, 153; *Crouse v. C. & N. W. R. Co.* 102 Wis. 209, 211. But in no such case was the question of whether the error was an error of the clerk or of the court suggested by counsel or in the mind of the court in deciding upon the motion for a retaxation. That was the precise question considered in *Fairbank v. Newton*, *supra*, and the decision thereof does not appear to have been overruled in any subsequent case. It follows that the motion for retaxation of costs must be denied with $10 costs, wholly upon the ground that, regardless of whether the disbursements claimed by appellant for printing as allowed by the clerk are excessive, the clerk did not commit any error in making such allowance.

By the Court.— So ordered.

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HYLAND, Intervener, Appellant, vs. ROE, Receiver, Respondent.

September 6 — September 24, 1901.

Banks and banking: Receiving money when insolvent: Rescission: Recovery of fund in hands of receiver: Identification: Pleading: Offer of restoration.

1. The acceptance of a deposit by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his money, although there may have been no intent on the part of the officers of the bank to cheat or defraud him in particular.
2. On the day before an insolvent bank closed its doors, the payee of a check on another bank delivered it to the insolvent bank and received a part of the amount in cash and a certificate of deposit for the balance. The check was sent to the drawee bank, which, by order of the insolvent bank, transmitted to the credit of the latter the amount which had been paid in cash but, at the request of the payee, held the balance for a time. Afterwards such balance was paid over to the receiver of the insolvent bank. *Held*, that the fund thus paid over was sufficiently identified as the proceeds of

the check to warrant its recovery by the payee upon rescission of the transaction for fraud.

8. A petition, in such case, that the receiver be required to pay over said fund to the payee of the check was not insufficient, on demurrer, because it failed to allege a readiness to return the amount of the cash received, since the insolvent bank had in turn received that amount; but, the certificate of deposit being a sufficient foundation for a claim for dividends, failure to tender it back or to offer to do equity in respect thereto rendered the petition demurrable.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The Dane County Bank was a banking corporation doing business at Stoughton, Wisconsin. The bank became insolvent, and at the suit of Sylvanus Ames and others a receiver was appointed to wind up its affairs. The appellant had a claim against the bank, and presented his petition to the court asking for an order requiring the receiver to pay over to him certain funds in his hands. The receiver demurred to the petition on the ground that it did not state facts sufficient to entitle him to relief. The demurrer was sustained, and the petitioner brings this appeal.

The facts stated in the petition are as follows: The Dane County Bank was a banking corporation organized in 1893, and conducted a general banking business at the city of Stoughton until June 10, 1899. Its affairs were under the immediate control of one O. M. Turner, its president, who had the confidence of the people, and the bank did a large business. The petitioner was a farmer, and from time to time had done business with the bank, and believed it was solvent. On the morning of June 9, 1899, he had and owned a check given by one G. F. Tallard on funds in the Tobacco Exchange Bank of Edgerton, Wisconsin, for $1,284.10. Not desiring to use said money, and having confidence in said Dane County Bank, the petitioner delivered said check to the president of the bank, and received from him $284.10 in

cash, and a certificate of deposit for $1,000. At that time the bank was insolvent, and known to be so by Turner. Notwithstanding such insolvency, it received said check, and on the same day transmitted it to the Edgerton bank for payment. On the following day the Dane County Bank closed its doors, and a receiver was appointed. On June 10, 1899, the Tobacco Exchange Bank, by order of the Dane County Bank, transmitted the sum of $284.10 by draft to Marshall & Ilsley's Bank of Milwaukee, to the credit of the Dane County Bank, being a part of the proceeds of said Tallard check. At the request of petitioner, the Tobacco Exchange Bank held $1,000, the remainder of the proceeds of said check, until November 27, 1899, when it was paid over to the receiver. A demand was made upon the receiver to pay over said sum, which was refused, and he still has said sum under his control.

For the appellant there were briefs by *Sanborn, Luse & Powell*, and oral argument by *A. L. Sanborn* and *L. K. Luse*. They contended, *inter alia*, that a tender of restoration was unnecessary. Such tender is usually made in the prayer for relief, and a demurrer will not reach a defect in the prayer. 6 Ency. of Pl. & Pr. 408; 3 id. 346; *Nelson v. Ferdinand*, 111 Mass. 300. In an equitable action, where the court has full power to protect the rights of the parties, a tender does not go to the cause of action. *Dunn v. Amos*, 14 Wis. 106; *Seeley v. Howard*, 13 Wis. 336; *O'Dell v. Burnham*, 61 Wis. 562; *Mankel v. Belscamper*, 84 Wis. 218; 2 Wait, Pr. 579. The certificate of deposit in this case was in legal effect nothing more than a promissory note, and such a note need not be tendered back in order to rescind or avoid a fraudulent purchase of property. *Hyland v. Bohn Mfg. Co.* 92 Wis. 157; *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183; *Nichols v. Michael*, 23 N. Y. 264; *Thurston v. Blanchard*, 22 Pick. 18; *Snow v. Alley*, 144 Mass. 546; *Duval v. Mowry*, 6 R. I. 479; *Manning v. Albee*, 11 Allen, 520.

For the respondent there was a brief by *Olin & Butler*, attorneys for *B. E. Wait*, successor to G. E. Roe as receiver, and oral argument by *H. L. Butler*. They argued, among other things, that whether the certificate of deposit was negotiable or nonnegotiable, it was the absolute promise to pay of the bank, and was presumably of value. The failure to set out in the petition a willingness and ability and offer to restore the certificate makes the petition demurrable. 18 Ency. of Pl. & Pr. 829, 831; *Herman v. Gray*, 79 Wis. 182, 187; *Becker v. Trickel*, 80 Wis. 484; *Welsh v. Blackburn*, 92 Wis. 562; *Walker v. Pogue*, 2 Colo. App. 149; *Reeves v. Corning*, 51 Fed. Rep. 774, 782; *Long v. Johnson*, 15 Ind. App. 498; *Wainwright v. Weske*, 82 Cal. 193; *Purdy v. Bullard*, 41 Cal. 444; *American F. L. & M. Co. v. Jefferson*, 69 Miss. 770; *Ross v. New England M. S. Co.* 101 Ala. 362; *State ex rel. Lewis v. Williams*, 39 Kan. 517; *Buena Vista F. & V. Co. v. Tuohy*, 107 Cal. 243; *American F. L. M. Co. v. Sewell*, 92 Ala. 163; *Herman v. Haffenegger*, 54 Cal. 161.

BARDEEN, J. The first point made against the sufficiency of the petition is that there is no sufficient averment of fraud to authorize a rescission of the transaction. The facts show that the bank was a going concern, and had been for some years, transacting a large business and receiving large sums for deposit; that it was conducted by its president, O. M. Turner, who had the confidence of the people in and about the city of Stoughton; that it was advertised by said bank and its officers that it was a safe banking institution; that from time to time the claimant had done business with the bank, and believed that it was a safe and solvent bank; that at the time of said deposit it was hopelessly insolvent, and had been for several months prior to that time, and that said Turner knew, and had good reason to believe, that it was insolvent and unsafe. The demurrer admits the truth of these facts. Sec. 4541, Stats. 1898, makes it a penal

offense for an officer of a bank to receive money on deposit when he knows, or has good reason to know, that the bank is unsafe or insolvent. The officer or agent of the bank who disobeys the statute or neglects to perform the duty imposed thereby, to the injury of a depositor, is personally liable for all damages resulting proximately from such disobedience or neglect. *Baxter v. Coughlin*, 70 Minn. 1. Bankers are held to a rigid responsibility for good faith and honest dealing. The acceptance of a deposit by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his money if he brings himself within the rules of law hereinafter to be mentioned. A bank hopelessly insolvent cannot honestly continue its business and receive the money of its customers; and, although there may be no intent to cheat and defraud a particular customer, it will be held to have intended the inevitable consequence of its act, which is to cheat and defraud all persons whose money it receives and whom it fails to pay before it is compelled to stop business. *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566. This court has spoken on this subject in language too plain to be misunderstood. In *Baker v. State*, 54 Wis. 368, the following language is used:

"A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be fully trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is intrusted with money simply because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurance of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the

money, of the ignorant and unwary by an implied deception. It is the old story of securing the victim by a display of false colors."

Banks stand upon a somewhat different footing from individuals. This difference is indicated by the language just quoted. Moreover, a bank is prohibited by law from continuing business after it has become insolvent. This is the effect of the statute. Not so as to an individual engaged in his private business. As said in *David Adler & Sons C. Co. v. Thorp*, 102 Wis. 70, the individual may have "an honest, though abortive, purpose to continue business," though founded in delusion and unreasonable expectation, and yet not be guilty of a fraud. In such a case, mere knowledge of insolvency, unaccompanied with false statements or artifices to deceive the trusting, is not considered fraudulent. Under the statute the bank has no right to continue business when its officers know, or have good reason to know, that it is unsafe or insolvent. If it does continue business, then the intent to cheat and defraud whoever deals with it irresistibly arises. The dishonest purpose comes from the knowledge of the officers and extends to all persons having dealings with the bank, and it is immaterial whether there was or was not a distinct intent to cheat or defraud a particular customer; otherwise, the bank might hide behind the alleged *bona fides* of the official, and the very purpose of the statute be defeated.

Another reason suggested why the petition is insufficient is that there is no sufficient identification of the proceeds of the check to authorize the relief demanded. Since the decision in *Nonotuck S. Co. v. Flanders*, 87 Wis. 237, if the fund sought to be secured has been disposed of by the banker before the funds have come to the possession of the assignee or receiver, or it has been so mixed with other funds as to lose its identity, it cannot be reclaimed. *Burnham v. Barth*, 89 Wis. 362; *Thuemmler v. Barth*, 89 Wis. 381; *Stevens v.*

Williams, 91 Wis. 58; *Dowie v. Humphrey*, 91 Wis. 98. Therefore there can be no recovery in this proceeding unless the money sought to be secured can be identified as the proceeds of the Tallard check with such certainty as to bring it without the line of the decisions cited. The decision of the trial judge was that when the check was deposited the title passed to the bank, and the claimant then stood in the position of a general creditor. He says:

"Though the transaction between him and the bank was in fact tainted by fraud, yet the title to the money by him deposited passed to the bank, and left him, when the bank closed its doors, as it did all others who deposited money within the period when the bank was insolvent, namely, a general creditor, to share *pro rata* out of the fund realized from the assets of the bank."

This court has never denied relief in such cases on the ground that the title to the money, draft, or check had passed to the bank. The decisions are based rather upon the fact that the claimant has been unable to identify the specific fund or thing demanded and trace it into the hands of the receiver or assignee of the estate. That is, the trust did not impress itself upon the whole corpus of the estate, but only followed the specific thing itself. If that could not be traced and identified, no relief was granted. The following language from the opinion in *Burnham v. Barth*, 89 Wis. 362, seems to cover the rule established in this state:

"Since the decision of the court in the case of *Nonotuck S. Co. v. Flanders*, 87 Wis. 237, and *In re Plankinton Bank*, 87 Wis. 385, it must be regarded as settled, in this state at least, that, in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent; that, when the trust fund has been dissipated or so confounded and mixed up with the property and estate of the trustee that it cannot be traced or identified, there remains nothing to be the subject of the trust."

No doubt the title of the check passed under the terms of the transaction alleged, but that title was subject to be defeated and the check reclaimed by showing fraud. If, while the bank had possession of this check, *Mr. Hyland* had demanded its return and offered to make return of that which he had received, his right would have been unquestionable, conceding the insolvency of the bank. Had the check been turned over to the receiver, the claimant's right would have been just as absolute, for the receiver would get no better title than the bank had. The check deposited was but the evidence of a debt due from the Tobacco Exchange Bank to *Mr. Hyland*. The proceeds of that check never came to the possession of the bank, and were never intermingled with its funds. The fact that the bank fraudulently attempted to account to *Hyland* for the proceeds does not alter the situation. It was the money due on that check that he was entitled to. The bank advanced to him a portion thereof in anticipation of its payment. That sum was repaid by draft sent to the Milwaukee bank. When the doors of the bank closed, there was the sum of $1,000 still in the hands of the Edgerton bank, which had not been paid over. The bank's claim to it was based upon a transaction alleged to have been fraudulent. The right of *Mr. Hyland* to rescind the transaction and to reclaim his money was absolute, if such fraud was proven. That right cannot be defeated by a mere system of credits. It is only when the identity of the fund has been lost, when it has been dissipated, or so confounded and mixed up with other funds that it cannot be traced, that it cannot be reclaimed. One thousand dollars of this specific fund had never reached the vaults of the defunct bank. While it was held by the debtor, the real owner made an attempt to reclaim it. By his request it was held by the debtor for some months. When it was paid over to the receiver, it was not a payment on an account due the Dane County Bank, but the payment of

the unpaid portion of the Tallard check. It came to the hands of the receiver as such, and in equity must be deemed to be held by him subject to the rights of *Hyland* thereto. It seems to us that the identification of the fund is complete in his hands, and the right of the claimant thereto absolute, under the rules heretofore stated, provided, of course, the facts alleged are sustained by proper proof.

What has been said is based upon the supposition that the claimant has placed himself in position to command the aid of a court of equity. This, however, is denied by the receiver, who claims that the petition is insufficient, because it contains no offer to do equity and does not show an offer of rescission or that it is within the power of the claimant to completely rescind the transaction. Referring again to the facts, it appears that when the check was deposited the claimant received $284.10 in cash and a certificate of deposit for $1,000. Presumably, this certificate was negotiable paper. The petition contains no allegation that the claimant is the owner and holder thereof, no offer to return, or allegation that he is in a position to return it. Neither does it allege any offer to return the money received. The receiver invokes the well-known rule that, before a contract can be rescinded, the party claiming the benefit of such rescission must allege an offer to return what he received, or a readiness to return the same; or, instead of such offer, that he elected to rescind the contract and the other party denied his right to do so. As regards the return or offer to return the money received, no good reason exists why it should be done or made. The petition shows that the Tobacco Exchange Bank paid the Dane County Bank $284.10 by draft to its credit at the Marshall & Ilsley Bank at Milwaukee. This effectually wipes out that item, and leaves the case free from any supposed complications arising therefrom. It would be far from equitable to require the claim-

ant to return or offer to return that which the bank has already received. This does not in any way conflict with the rule of total rescission. What was said on this subject in the recent case of *Ludington v. Patton*, *ante*, p. 208, sufficiently answers the contention of counsel on this point.

The proceeding is equitable in its nature, and the claimant ought not to succeed without a showing that the estate in the hands of the receiver will not suffer beyond the liability claimed. The petition simply alleges a demand on the receiver for this $1,000 as the proceeds of said check, and a refusal to pay. It does not appear that this demand upon the receiver was made upon a claim of a rescission of the former transaction, or that the refusal to pay was based upon a denial of the right of rescission, so as to bring the case within *Potter v. Taggart*, 54 Wis. 395. Nor do the allegations of the petition bring it within that class of cases of which *O'Dell v. Burnham*, 61 Wis. 562, is a type, where an offer to tender back money was not made before action brought. In this case the plaintiff offered to do so in his complaint, and it was held that the objection that he had not done so before suit was not available after the matter had gotten into court. At most, it could only affect the question of costs. Nor should the situation be confused with another class of cases, where the willingness or readiness to restore is not alleged in the complaint, and the absence of such allegations was not taken advantage of by demurrer. Where restoration is a mere matter of administration in a suit that has been litigated, the court can very easily preserve the rights of the parties by requiring restoration as a condition of relief. But, when the sufficiency of the pleading is tested by demurrer, a stricter rule is applied, and the party seeking relief must affirmatively show a readiness and willingness to do equity in order that his pleading shall withstand the test. This is necessary to prevent fruitless trials and the expense of useless litigation.

The rule of pleading in this regard seems to be correctly stated in 18 Ency. of Pl. & Pr. 829:

"The plaintiff will not be permitted to repudiate his contract and still retain the benefits which he has derived from it; and his desire and willingness to restore what he has received must appear in the bill or complaint, otherwise he will have no standing in a court of equity."

Again, page 831:

"It is for the plaintiff to show clearly that he can restore to the defendant all that he has received under the contract, and that the parties can be placed *in statu quo*, and it is not for the defendant to show that it cannot be done." *Davis v. Tarwater*, 15 Ark. 286.

In *Ludington v. Patton*, *supra*, this language is used:

"It is sufficient, in an action for rescission, to show in the complaint a willingness to do equity, to submit to a complete rescission so far as practicable, and to make the defendant good for what was received from him in such manner as the court may direct."

See *Eslava v. Elmore*, 50 Ala. 587; *Mohawk & H. R. Co. v. Clute*, 4 Paige, 384. In order to secure relief in a court of equity, a party must so frame his pleading as to indicate a willingness that the court may deal with him as well as the defendant on such terms as to do complete justice. A failure to offer to do equity where some affirmative action is necessary to restore the former condition or put the parties on an equality renders the pleading demurrable. The certificate of deposit was sufficient as a foundation for a claim to dividends. The receiver was bound to protect his estate against double claims. The order of the court below must be sustained upon the sole ground that the petition is insufficient, in that it fails to meet the rule in equity above mentioned. The order of the trial court gives the privilege of amendment, and it will undoubtedly be an easy matter for the claimant to amend his petition in the particulars referred to.

By the Court.— The order is affirmed, and the cause is remanded for further proceedings according to law.

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OMAHA NATIONAL BANK, Appellant, vs. JOHNSON, Respondent.

September 6 — September 24, 1901.

***Principal and surety:** Knowledge of secondary liability: Release from liability: Extension of time of payment.*

1. No matter what form a contract may take, if the fact that one of several obligors thereto is a surety merely, as between himself and his co-obligors, is brought to the knowledge of the creditor, he owes to such surety the duty of having no transactions or dealings with the principal debtors which shall vary the former's position or prejudice him.
2. In an action by a bank upon promissory notes given to it, uncontradicted evidence that one of the makers stated to the cashier, at the time the notes were executed and when all the parties were present, that he was going to "back up" and "stand behind" the other makers, and that the cashier understood that such maker was signing merely as security, is *held* to show that he was a surety merely, although by reason of the form of the notes he made himself absolutely liable in the first instance.
3. When notes which one of the makers had signed as surety became due, new notes with specified times of payment were taken, interest thereon paid in advance, and the old notes canceled and given up,— all without the knowledge or consent of the surety. *Held*, that the surety was released from liability.
4. The fact that the renewal notes in such case were signed in the name of the K. & D. Coal Co., instead of in the individual names of K. and D. (who did business in the form of said corporation), is immaterial, where it appears that they were given to represent the same indebtedness as the original notes.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Suit on four promissory notes, dated in the spring and summer of 1897, all signed by C. H. Davidson, M. D. Karr, and the defendant, *Harry Johnson*. It appeared by plaintiff's evidence that Karr and Davidson were engaged in business at Omaha in the form of a corporation known as the Karr & Davidson Coal Company; that, after two of the notes in suit had been given and discounted by the plaintiff

and the money carried to the account of that corporation, they applied for more money, saying that they desired to enlarge their business, offering the signature of the defendant in addition to their own. An interview then took place between the bank officers and the defendant, together with Karr and Davidson, in which, according to the plaintiff's testimony, defendant stated that he was going in with Karr and Davidson and was going to back them up; that he was going to stand behind them; and at the request of the bank he gave a property statement, showing his own financial condition. The testimony of the cashier was that he understood that the defendant was going security for them. Thereafter, as the several notes fell due, the bank took new notes signed by the Karr & Davidson Coal Company, to some of which were joined Karr and Davidson personally. These notes were discounted, interest thereon paid in advance, and the net proceeds credited upon the bank account of the Karr & Davidson Coal Company, and a check given by that company to take up the pre-existing notes bearing defendant's signature, which were stamped "Paid" and delivered up. Several renewals of each of such notes of the company were indulged, until it failed in November, 1898. No knowledge of or consent to these transactions on the part of the defendant was shown. The complaint alleges that the several notes of the Karr & Davidson Coal Company were given to represent the same indebtedness originally evidenced by the notes sued on, signed by the defendant with Davidson and Karr.

At the close of plaintiff's evidence, on motion of the defendant, judgment of nonsuit was entered, from which the plaintiff appeals.

For the appellant there was a brief by *W. R. Bagley* and *Rufus B. Smith*, and oral argument by *Mr. Smith*. To the point that the substitution of another paper for the notes signed by the defendant did not release him, there being

no agreement to accept the substituted paper in payment of the original, they cited *Allis v. Meadow Spring D. Co.* 67 Wis. 16; *First Nat. Bank v. Finck*, 100 Wis. 446; *First Nat. Bank v. Case*, 63 Wis. 504.

For the respondent there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

DODGE, J. Two propositions were decided by the circuit court, both of which are vigorously assailed by the appellant. The first is that it appeared by the plaintiff's own evidence that the defendant, *Johnson*, to the knowledge of the plaintiff, bore the relation of surety to the indebtedness originally evidenced by the notes signed by him and here sued upon; second, that by the taking of the several renewal notes the plaintiff extended the time of payment of that indebtedness, and thereby discharged the defendant. The rule is well settled that wherever, as between joint or several obligors to a contract, the duty of the one is primary and of the other secondary, so that, as between themselves, the obligation or the debt is properly that of the former, who thus owes to the latter the duty of exoneration, the relationship of principal and surety exists, no matter what the form of the contract or how absolute may be the undertaking of him who is in fact the surety. This relationship cannot vary or diminish the rights of the creditor upon the original contract. He may even ignore the principal debtor and sue the surety alone, at his will or convenience, if the form of the contract warrants. But, if the fact of the true relationship between the debtors is brought to his knowledge, he owes to him who is only secondarily liable that duty which the creditor uniformly owes to the surety, of having no transactions or dealings with the principal debtor which shall vary the surety's position or jeopardize him. This duty rests upon the actual relation between the parties, and cannot be obscured or excused by any considerations of

form or manner of contracting. *Harris v. Brooks*, 21 Pick. 195; *Guild v. Butler*, 127 Mass. 386; *Canadian Bank v. Coumbe*, 47 Mich. 358, 362; *Riley v. Gregg*, 16 Wis. 666; *Gates v. Hughes*, 44 Wis. 332, 338; *Irvine v. Adams*, 48 Wis. 468; *Breitengross v. Farr*, 100 Wis. 215; Brandt, Suretyship & G. §§ 29–37.

In the light of this rule of law, we are convinced that the circuit court decided rightly that the defendant here was but a surety. The testimony offered by the plaintiff from the mouths of its own officers was open to no other reasonable construction than that, the parties all being present, it was understood and explained that the defendant was not the beneficiary of the loans, nor the primary debtor for their repayment, but that he was pledging his liability upon a specific written contract as security for the debt of some one else. No other possible significance can be accorded the statement that in signing such papers he was to "back up" and "stand behind" the others,—a meaning which is emphasized and rendered all the more clear by the expression that he was understood to be signing merely as a security. Thus we reach the conclusion, as did the circuit court, that the defendant was a surety merely for the indebtedness evidenced by the four notes which are the basis of this action, although, by reason of the form of such notes, he made himself absolutely liable in the first instance.

Among the acts by which a creditor will release a nonconsenting surety, none has been more frequently or more universally declared effective than a binding extension of the time of payment of the indebtedness. *Riley v. Gregg*, 16 Wis. 666; *Hallock v. Yankey*, 102 Wis. 41, 43. The reasons for the efficacy of such act are that during the time of the extension the creditor has disabled himself from proceeding to collect from the principal debtor, and has subjected himself to an increased peril of such debtor's becoming insolvent and unable to pay, thus protracting the period of peril to

the surety beyond that to which he had assented. It seems too plain for debate that the plaintiff here has effectively extended the time of payment of the indebtedness for which defendant originally made himself liable. When the notes which he had signed became due, new notes, with specified time of payment,—sometimes sixty and sometimes ninety days,— were taken, the notes signed by the defendant were canceled and given up, and this was done upon a consideration uniformly held sufficient to make the extension binding upon the creditor, namely, upon the payment of interest in advance. *Batavian Bank v. McDonald*, 77 Wis. 486; *Hallock v. Yankey, supra.* The only answer which appellant is able to suggest to this obvious conclusion is that in some instances the renewal or extension notes were not the notes of any of the parties whose names appeared upon the original notes, from which he argues that the giving of the new notes of itself raises no presumption of extension of the original indebtedness. It is pretty apparent that the parties recognized no distinction between Karr and Davidson, the individuals engaged in the coal business, and the Karr & Davidson Company, the corporation under which it was conducted; and that the indebtedness was understood by all to be the indebtedness of that business, namely, of the corporation conducting it. It is unnecessary, however, to discuss the effect of the testimony in this respect, for plaintiff, in its complaint, has expressly set up and asserted the relationship between the new notes taken and the pre-existing indebtedness. Thus it is alleged in each instance that the renewal or extension notes made by the Karr & Davidson Company were "delivered to the plaintiff to represent the said indebtedness of the defendant and said Davidson and said Karr," and to evidence the sum of money due to it from the makers of the original notes. This leaves no uncertainty as to the transaction had by the bank with both the individuals, Karr and Davidson, or with the corporation, nor as to their relation

to the indebtedness for which the defendant was surety. By thus repeatedly extending the time at which payment of the indebtedness could be enforced from those primarily and equitably liable therefor until, by reason of insolvency, the indebtedness was not collectible at all, the plaintiff has discharged the defendant from his liability thereon. The circuit court properly entered judgment of nonsuit.

By the Court.— Judgment affirmed.

THE STATE EX REL. COURT OF HONOR OF ILLINOIS, Respondent, vs. GILJOHANN, Commissioner of Insurance, Appellant.

September 7—September 24, 1901.

Mandamus: *Appeal: Return: Motion to quash: Foreign insurance companies: License: Powers of insurance commissioner.*

1. A proceeding by *mandamus* is a civil action, and the awarding of a peremptory writ a final judgment, within the meaning of the appeal statutes.
2. A motion to quash the return to an alternative writ of *mandamus* cannot properly be made. Relator should demur or answer.
3. Under secs. 1955*e*, 1955*f*, 1968, Stats. 1898 (requiring foreign assessment insurance companies to comply with certain conditions before being admitted to do business in this state, and requiring the commissioner of insurance to investigate their character and standing before admitting them, for the purpose of ascertaining whether such conditions have been complied with), said commissioner is entitled to a reasonable time in which to make the investigation, and to some extent is called upon to exercise discretion in passing upon the application and to pass judgment upon the facts disclosed by the investigation. He should not be compelled by *mandamus* to issue a license, where, although he had previously refused on insufficient grounds to issue the same, he had notified the applicant of a reconsideration of such action and, at the time of the issuance of the alternative writ, was proceeding to make proper examination into the affairs and condition of the company.

The State ex rel. Court of Honor of Illinois vs. Giljohann.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

On March 6, 1901, the relator obtained from the trial court an alternative writ of *mandamus*, requiring the defendant, as insurance commissioner, to show cause why he should not issue to it a license in due form of law, under and according to the terms and provisions of sec. 1955*e*, Stats. 1898, and the laws of Wisconsin applicable thereto, authorizing the relator to do business in this state under and according to the terms and provisions of the laws of this state. Such writ, among other things, in effect, alleged that the relator had made application to the defendant for such license January 22, 1901; that it had complied with all the requirements of the statutes entitling it to such license; that the commissioner of insurance had admitted that the application of the relator was in all respects in conformity with the law, but refused to grant to the relator a license to do business in this state solely on the ground that he did not consider that its rate of assessment as shown by its constitution and by-laws, as therein set forth, was high enough to do business on as such association, and gave, and has continued to give, and still gives, that as his only reason for refusing to grant such license, which had been duly demanded by relator, and the fee required by law therefor ($50 in gold) duly and legally tendered to him for that purpose before the filing of the petition for such writ, which tender was refused by the commissioner, but which was still kept good by the relator, and it had been continuously since and still was ready to pay the same at any time; that the relator had complied in all respects with all the requirements of the laws of this state and of Illinois entitling it to a license in this state, and was entitled to such license; that the rate of assessment upon which it was then doing business, and upon which it had been doing business since its incorporation, is fixed and set forth in its constitution, as therein stated; that

the rate of assessment was sufficiently high to enable it to pay claims against it, and to transact its business under its charter and constitution and by-laws; that the commissioner made no claim that any of the statements and papers so filed in his office were untrue or not the fact, and made no claim that the relator had not fully complied with all the provisions of the law, and admitted that it was entitled to a license, except that he had the discretionary power to decline to issue it solely for the reason that its rates of assessment were not satisfactory to him; that February 27, 1901, the commissioner, after repeatedly giving as his reason for not issuing the license its low rate of assessment, and without suggesting that he desired to make any other or further examination of the affairs of the relator, wrote this letter to the relator, to wit: "I have reconsidered your application, dated Jan. 22d, 1901, for a license to transact business in this state, and will send two examiners of this department to your city to make an examination of your organization, as required by paragraph 241 of the insurance laws of this state. Trusting this will be satisfactory to you, I remain, sincerely yours, *Emil Giljohann*, Commissioner of Insurance;" and at the same time inclosed a copy of the same to the relator's attorney, with the following note: "I inclose a copy of a letter forwarded this day to Mr. A. L. Hereford, supreme chancellor of the *Court of Honor*, in relation to his application for permission to transact business in this state. Sincerely yours, *Emil Giljohann*, Commissioner of Insurance;" that such letters were not written until after the relator had employed an attorney to institute proceedings against the commissioner to compel him to give to the relator a license to do business in the state, and after such attorney had apprised the commissioner of the fact that he was so employed; that a demand was made upon the commissioner for a license to the relator after the communication was delivered, and the same was refused solely on the ground that the rate of assessment was too low.

On March 8, 1901, the defendant made return to such writ, and, among other things, alleged that February 6, 1901, he gave to the relator his reasons for refusing such application, to the effect that the Fraternal Congress, of which the relator was a member, did, at its meeting in Boston, in August, 1900, adopt a uniform bill, and recommended its passage by the legislatures of the several states, requesting insurance commissioners to assist in its passage, to the effect that no association should be admitted to transact business within this state without first showing that its mortuary assessment rates are not lower than indicated in the mortality tables given; that the pending bill, if passed, would preclude the admission of the relator from entering the state with the table of rates one third lower than therein required, and that, if the bill did not pass, he should still require the rates recommended in the bill; that thereafter, and upon further consideration of such application, he decided to reconsider such application and to make further investigation as to whether or not the relator was or is entitled to do business in this state, and thereupon, and on February 27, 1901, he sent to the relator the letter mentioned in the writ, and the note to its attorney, as therein mentioned; that on the next day, February 28, 1901, the relator's attorney, Mr. Chynoweth, came to the defendant, and requested him not to send examiners to the city of Springfield to make an examination of the relator; that, upon the defendant's deciding to reconsider the application of the relator for such license, the defendant commenced an investigation of the affairs and condition of the relator to determine whether or not it was solvent and had fully complied with the provisions of law entitling it to do business in this state, and that the defendant had not yet fully completed such examination and investigation, and had not yet fully determined whether or not the relator was entitled to do business in this state; that the defendant, for

further answer and return to the relation and writ, denied that his refusal to grant a license was based solely upon the ground that the rate of assessment of the relator was too low,— wherefore the defendant demanded judgment quashing and dismissing the alternative writ.

On April 17, 1901, the defendant was, on motion of the relator, ordered to make a supplemental return, on the ground that the one previously made was "indefinite and uncertain" in that it did not specify or designate what examination and investigation he had made or was making.

On April 23, 1901, the defendant made such supplemental return, and therein stated, among other things, that when he denied the application of the relator, February 6, 1901, he believed that he had legal right to do so and that it was his duty to refuse the license on the ground that the assessment rates were insufficient to protect holders of certificates of the relator; that on or about February 27, 1901, the defendant presented the question as to whether he had the legal right to refuse such license upon the grounds specified to the attorney general, and was then and there advised by him that, technically, it was questionable whether he had the right to refuse such license upon such ground; that he thereupon wrote to the relator the letter of February 27, 1901, set out in full in the original return and also in the writ; that February 28, 1901, Mr. Chynoweth came to the defendant's office, and stated to him that the relator did not want the defendant to send any one to Springfield to make examination of the organization and affairs of the relator, and requested him not to make such examination, as the rights of the parties were determined by the facts as they then existed, and that he intended to make application to this court for a writ of *mandamus* compelling the defendant to issue such license to the relator, and that he wanted the rights of the relator to be adjudged as they then were; that March 1, 1901, said attorney made application for such

writ to this court, and the same was denied March 19, 1901; that February 27, 1901, the defendant commenced a careful examination of all the papers and documents filed in his office by the relator upon making such application, taking the matter up and going over the same carefully with his assistant; that such examination was not fully completed when the alternate writ was served upon him; that the defendant intended and still intends to send examiners to Springfield to make examination into the condition and affairs of the relator, as provided in sec. 1968, Stats. 1898, and that the defendant only refrained from sending such examiners to Springfield by reason of such action and statements of the relator's attorney, and the advice of the attorney general as to the effect of such application for an issuance of said alternative writ.

On May 13, 1901, the original order or judgment was entered, quashing the return and supplemental return to the alternative writ, and ordering and adjudging that the peremptory writ issue. On motion of the relator the trial court, on June 17, 1901, made an order or judgment, reciting therein that each and every allegation contained in the petition for the alternative writ and recited in that writ was therein determined and adjudged to be true, and thereupon it was ordered and adjudged, in effect, that all previous proceedings quashing the return and supplemental return be, and the same were thereby, vacated, set aside, and held for naught; that such return and supplemental return, and both and each of them, be, and the same were thereby, quashed; and it was therein further ordered and adjudged that a peremptory writ of *mandamus* issue out of the trial court, commanding the defendant, as commissioner of insurance, to forthwith issue in due form of law, to the relator, the license prescribed by secs. 1955*e*, 1955*f*, Stats. 1898, and acts amendatory thereto, and in accordance with the laws of this state applicable thereto, to do business as an insurance association. From that order or judgment the defendant appeals.

For the appellant there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

For the respondent there was a brief by *H. W. Chynoweth*, attorney, and *Wm. B. Risse*, of counsel, and oral argument by *Mr. Chynoweth*.

CASSODAY, C. J. Counsel for the relator contends that the defendant could not appeal from the order and judgment quashing both returns and awarding a peremptory writ of *mandamus*. One ground of such contention is that it is a judgment, and not an order. This court has treated the awarding of such writ as a judgment, and also referred to it as an order or judgment. *State ex rel. Voight v. Hoeflinger*, 31 Wis. 257, 260, 264; *Rork v. Smith*, 55 Wis. 67; *State ex rel. Taylor v. Delafield*, 64 Wis. 218; *State ex rel. Star Prairie v. St. Croix Co.* 83 Wis. 340, 343, 344, 348. If allowed to stand, it certainly determines the rights of the parties, and is, in effect, a judgment. The supreme court of the United States has held that "an order awarding a peremptory writ of *mandamus* is a final judgment in a civil action, within the meaning of that term as used in the statute regulating writs of error to the United States supreme court." *Davies v. Corbin*, 112 U. S. 36. This being so, counsel contends that such judgment was not rendered in "an action, either civil or criminal," and hence that it cannot be reviewed on appeal, but only upon writ of error. It is conceded that if it is a judgment in a civil action it may be reviewed on this appeal. Nearly twenty years ago this court, after hearing able and learned counsel, and after careful deliberation, held that "a proceeding by *mandamus* is essentially a suit, and when issue is joined by the return it becomes a civil action, within the meaning of the statutes, and as to the form and sufficiency of the several pleadings

must be governed by the same rules which prevail in other civil actions." *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 113. The ruling in that case has been steadily adhered to since. *State ex rel. Taylor v. Delafield*, 64 Wis. 218, 220; *State ex rel. Drury v. Lincoln*, 67 Wis. 274, 276; *State ex rel. Buchanan v. Kellogg*, 95 Wis. 678; *State ex rel. Rice v. Chittenden*, 107 Wis. 355. See, also, *Davies v. Corbin*, *supra*. The result is that the appeal did bring up the judgment for review.

One portion of that judgment quashed the return and the supplemental return. The statute provides that "whenever a return shall be made to any such writ, the person prosecuting the same may demur or answer all or any of the material facts contained in the same return." Sec. 3451, Stats. 1898. *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 117, 118. The relator did not demur to nor answer the return in this case. A motion to quash may properly be made to the writ, but not to the return. Such motion to quash is in the nature of a demurrer. *State ex rel. Cothren v. Lean*, 9 Wis. 279. Since the relator did not take issue with either of the two returns, we must assume the facts therein stated to be true.

The important question is whether such facts are sufficient to show that the relator is not entitled to the writ. The statute requires certain conditions to be complied with before certain foreign insurance companies, like the relator, can be admitted to do business in this state. Sec. 1955*e*, Stats. 1898. The statute also provides:

"The commissioner shall investigate the character and standing of all such organizations applying for license, and if approved by him, and if the conditions hereinbefore imposed have been complied with, he shall notify it of his approval: . . . provided, that no license to do business in this state shall be issued to any such organization to whose country, state or territory any Wisconsin corporation, society, order or association doing business on the assessment

plan, which has complied with the requirements of the laws of this state, has been or would be refused admission to do business on compliance with the laws thereof. The commissioner shall also refuse license to do business to any foreign organization whose name or title he shall deem too similar to one already appropriated or likely to mislead the public. These conditions having been complied with, he shall issue to each organization a license, after which it may transact business in this state; and said license shall continue in force until revoked pursuant to law; provided, that it shall be *cause for refusing such license* or for revoking it if the literature used by the organization in soliciting business is misleading in respect to the business done or in conflict with the law of this state." Sec. 1955*f*, Stats. 1898.

The statute also provides that:

"The commissioner of insurance may address inquiries to any insurance corporation doing business in this state or any officer thereof in relation to its doings or condition or any other matter connected with its transactions; and it shall be the duty of every corporation or officer so addressed to promptly reply in writing to such inquiries; and, whenever he shall deem it expedient so to do, or when any responsible person shall file with him written charges against any such corporation alleging that any return or statement filed by it with such commissioner is false or that its affairs are in an unsound condition, he shall, in person, or by some one to be appointed by him for that purpose, . . . examine into its affairs and condition; and it shall be the duty of the corporation, its officers or agents, to cause its books to be opened for inspection. . . . Whenever it shall appear to the said commissioner from his own examination or the report of the person appointed by him that the condition of any foreign company examined is unsound, he shall revoke the certificate granted such company and cause a notification thereof to be published in the official state paper and mail a copy thereof to each agent of the company, and the agent or agents thereof, after such notice, shall be required to discontinue doing business for such company. The commissioner shall, in like manner and upon like conditions, examine insurance corporations *applying for admission* to transact business in this state, and if the affairs or condition of any such corporation do not fully meet the requirements of law he shall withhold his certificate." Sec. 1968, Stats. 1898.

It appears from the return that the defendant was in good faith seeking to do his official duty, as prescribed in these statutes, when he was stopped by the action of the relator.

Counsel for the relator seeks to limit the inquiry to the question whether its rate of assessment was too low, and this is put upon the ground that the defendant, on February 6, 1901, refused the license on that ground. But on February 27, 1901, the defendant reconsidered such action, and proposed to make examination into the affairs and condition of the relator, as stated. The return expressly denied that the defendant refused to grant such license "solely upon the ground that the rate of assessment of said relator was too low." The defendant was prevented from completing such examination as he was expressly authorized by the statutes quoted to make, and which seems to have been his official duty to make, if necessary, in order to act intelligently on the application. He, as such commissioner, was to be satisfied that the relator was entitled to such license, before he was required to issue the same to him. In order to be thus satisfied, he was entitled, if necessary, to a reasonable time to examine and investigate into the affairs and condition of the relator. He was, to some extent, called upon to exercise discretion, and to pass judgment upon the facts when ascertained by such examination and investigation. It is well settled, as this court has repeatedly declared, that, "when administrative officers refuse to perform a mere ministerial duty imposed upon them by law, and which they are thereby bound to perform without further question, then, if they refuse, a *mandamus* may issue to compel them to perform such duty; but, when such official act requires the exercise of judgment or discretion on the part of such officers, then a *mandamus* will not be granted." *State ex rel. Gericke v. Mayor of Ahnapee*, 99 Wis. 326, and numerous cases there cited; *State ex rel. Schermerhorn v. McCann*, 107 Wis. 348; *State ex rel. Buchanan v. Kellogg*, 95

Wis. 679. Even to that rule there is an exception. *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 623. We must hold that the returns stated a good defense.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to quash the writ and dismiss the relation.

MARVIN, Trustee, Appellant, vs. ANDERSON and others, Respondents.

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September 7—September 24, 1901.

Insolvency: Fraudulent conveyances: Corporations: Sale of property: Trust fund: Creditors' lien: Purchase of stock: Deed: Presumption of authority.

1. The term "insolvency," as understood in the administration of bankrupt and insolvent laws, is inability of a person to pay his debts as they mature in the regular course of business; as understood in dealing with contracts challenged on the ground of fraud, actual or constructive, it has reference to insufficiency of assets of the debtor to cover his liabilities.
2. In respect to the *bona fides* of a sale of property when challenged by a creditor of the vendor on the ground of fraud, the latter is said to have been solvent at the time of the sale if he then possessed a substantial excess of assets, on a cash basis, over and above his liabilities; and that rule applies to corporations as well as natural persons.
3. A solvent, going corporation has the same right to sell its property in the regular course of business, regardless of whether the vendee is a stockholder of the corporation, as a natural person.
4. The trust fund doctrine, so called, has no application to a going corporation. Its creditors have no equitable lien upon its assets. Such a lien does not attach till the corporation is insolvent and has either suspended business or is on the verge of collapse, so that it may reasonably be said to be civilly dead as regards the purposes for which it was organized.
5. A solvent corporation may purchase its own stock if not prohibited by its articles of organization or some statute.

6. If capital stock in a corporation is purchased for it by its officers without any special authority so to do, the transaction cannot be impeached by stockholders who knew of and consented to the transaction, or by the corporation or any representative thereof, if all the stockholders acquiesced in the purchase, nor by subsequent creditors.
7. If the deed of a corporation is executed in the manner prescribed by statute, the presumption is that its officers were duly authorized to make it. Such presumption will prevail against all persons who acquiesced in the transaction, or mere proof that corporate action by the stockholders was not taken, specifically authorizing the particular transaction.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action by the trustee in bankruptcy of the property of the Badger Cycle Company to set aside a deed, given by the bankrupt some time before the commencement of the bankruptcy proceedings, upon the ground that it was fraudulent as to the creditors and stockholders of the corporation. The court decided as matters of fact as follows:

On October 22, 1897, the day when the deed was given to defendant *Louis Anderson*, he was and for some time prior thereto had been a stockholder of the corporation, possessed of five out of the fifty shares of its capital stock, each share being of the par value of $100, and was also a director of the corporation and the foreman of its business. At such time the corporation was indebted to its stockholders in the sum of $1,573, $803 of which was due to *Anderson* for labor and services; was also indebted to outside parties in the sum of $5,444.32; and possessed property of the value of from nine to ten thousand dollars, being solvent and in every respect a going corporation. *Anderson*, upon the advice of his physician, decided to discontinue his work for the corporation, and thereupon requested it to pay him the amount due for his services. It being difficult for the corporation to comply with such request by paying *Ander-*

son in money, the parties agreed, without any formal action by the directors as a board or by the stockholders, but upon their individual consideration and determination, that plaintiff should release his claim against the corporation and transfer to it his five shares of capital stock, and receive therefor the real estate in question, which was of the value of $850 and was not used in the corporate business, four bicycles of the value of $20 each, and $225 in money, which agreement was fully consummated. All the stockholders and directors had knowledge of and fully acquiesced in the entire transaction, and after it occurred treated it as valid till after the commencement of the proceedings in bankruptcy nearly two years subsequent to the making of the deed. Aside from claims of stockholders of the corporation who acquiesced in the transaction in question, the only claim proved in bankruptcy which existed at the time of such transaction was a small one in favor of one Comstock, which, prior to the commencement of this action, was fully paid. After the making of the deed and before its validity was in any way called in question, *Anderson* mortgaged the land to defendant *John Gilbert* to secure the payment of a loan of $200.

Upon such facts the court concluded as a matter of law that plaintiff was not entitled to recover, and thereupon rendered judgment in favor of defendants.

For the appellant there was a brief by *Tenney, Hall & Tenney*, attorneys, and *H. W. Chynoweth*, of counsel, and oral argument by *Mr. Chynoweth*. They contended, *inter alia*, that under sec. 1775, as amended, the corporation had no power to convey the legal title to the said land, except as prescribed by the statute. This it did not do, hence its action was void. Thompson, Corp. §§ 5060, 5075; *Brewster v. Hartley*, 99 Am. Dec. 237; *Stow v. Wyse*, 18 Am. Dec. 99; *Henning v. U. S. Ins. Co.* 4 Am. Rep. 332; *Sanborn v. Fireman's Ins. Co.* 77 Am. Dec. 419; *Rockwell v. Elkhorn Bank*,

13 Wis. 657; *Isham v. Bennington I. Co.* 19 Vt. 230; *Fountaine v. Carmarthen R. Co.* L. R. 5 Eq. 316; Cook, Stock (2d ed.), § 725; *Galloway v. Hamilton*, 68 Wis. 654.

For the respondents there was a brief by *Haskell & Getts*, attorneys, and *Jones & Stevens*, of counsel, and oral argument by *H. M. Haskell* and *E. Ray Stevens*.

MARSHALL, J. If the Badger Cycle Company was solvent at the time of the transaction in question, the main contention by counsel for appellant, that the judgment appealed from is wrong, fails. The trial court decided that question in the affirmative because the property of the corporation, at a fair valuation, exceeded to a considerable extent its debts. Appellant's counsel say that was not the proper rule to be applied. The conclusive answer thereto is that the trial court followed the law as it has been laid down by this court. *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352; *Shaw v. Gilbert*, *ante*, p. 165. Counsel makes the common mistake of failing to distinguish between the meaning of the term "insolvent," as the subject of insolvency is dealt with by insolvent and bankrupt laws, and the general meaning thereof. The former is inability of a person to pay his debts as they mature in the ordinary course of business; the latter is a substantial excess of a person's liabilities over the fair cash value of his property. The former does not militate against a debtor corporation dealing with its property as it sees fit; while the latter, in case of a corporation, if it is on the verge of collapse or has suspended payment — is in a condition, as the books say, to be rightfully considered, so far as capacity to do business is concerned, civilly dead — is held to impress upon its property a trust for the benefit of its creditors. *Hinz v. Van Dusen*, 95 Wis. 503; *Shoemaker v. Washburn L. Co.* 97 Wis. 585; *Graham v. Railroad Co.* 102 U. S. 148; *Slack v. N. W. Nat. Bank*, 103 Wis. 57; *Hamilton v. Menominee Falls Q. Co.*, *supra*.

The further question is presented of whether the corporation was justified, as to its creditors or stockholders, in purchasing its own stock and parting with corporate property in payment therefor. There is no impediment in the way of a solvent corporation, having power to purchase and sell and convey property and not prohibited by its constitution or any statute, from buying in its own stock. This court has several times passed upon that question. *Shoemaker v. Washburn L. Co.*, *supra*; *Calteaux v. Mueller*, 102 Wis. 525. It was held in the last case cited that such rule could not be invoked to justify an officer of a corporation, without special authority, in buying in its capital stock in its name, but that situation does not apply in this case, since all the stockholders of the cycle company knew of and individually considered and approved the transaction in question before it occurred, and thereafter, so long as the corporation existed as a business institution, a period of some two years, acquiesced in it.

If under any circumstances the sale of land to respondent could be impeached on the ground of fraud or want of power in the corporation to make the sale, appellant has no standing in court to do so, since all the stockholders are estopped by their conduct from complaining, and the receiver, as the representative of the corporation, has no better right in their behalf. Further, there is no indebtedness to any nonstockholder of the corporation which existed at the time the transaction took place. *Shoemaker v. Washburn L. Co.*, *supra*; *Graham v. Railroad Co.*, *supra*. Here again counsel seem to have fallen into a common error, that of not keeping in mind that the rule under which, in any case, the property of a corporation is deemed a trust fund for creditors and stockholders, or either, is wholly a creation of courts of equity, and that only those have equitable rights in a fund at the time of its depletion who have then a right to resort to such fund to satisfy their claims. Creditors of a corporation are

not presumed to have relied upon property of their debtor which it did not possess when the indebtedness accrued, and therefore are not held to have any equitable claim thereon.

The last suggestion made by counsel for appellant is that the title to the property did not pass because the acknowledgment was defective, and further because the stockholders did not, by a majority vote, authorize it. To that, sec. 1775, Stats. 1898, is cited, which provides that a corporation may, "by a majority vote of the stock given at any regular meeting or at any special meeting duly called for that purpose, sell and convey or authorize to be conveyed all or any portion of the property owned by it, whether real, personal or mixed." This court has never held, as counsel seem to think, that a majority vote of stockholders of a corporation is necessary to every transfer of real estate made by it in the regular course of its authorized business. *Galloway v. Hamilton*, 68 Wis. 651, cited by counsel to sustain their view, merely holds that a corporate deed, to be valid, must be executed in the manner required by statute, that is, must be signed by the president or other authorized officer of the corporation, sealed with the corporate seal, and countersigned by the secretary or clerk. That was done in this case. Whether the acknowledgment was defective is immaterial. That has nothing to do with the effectiveness of the instrument between the parties to convey title. True, as a general rule and by statute it is necessary that corporate officers should have authority from the corporation to execute deeds, but one executed in the manner above indicated raises a strong presumption that they were so authorized. Herman, Estoppel, § 1176; Elliott, Priv. Corp. § 495; *Ford v. Hill*, 92 Wis. 188; *New England W. & C. Co. v. Farmington E. L. & P. Co.* 84 Me. 284; *National S. Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352; *Patterson v. Robinson*, 116 N. Y. 193; *Eureka I. & S. Works v. Bresnahan*, 60 Mich. 332; *Blackshire v. Iowa H. Co.* 39 Iowa, 624; *Murphy v. Welch*, 128 Mass.

489; *National L. & I. Co. v. Rockland Co.* 94 Fed. Rep. 335; *Gorder v. Plattsmouth C. Co.* 36 Neb. 548; 4 Thompson, Corp. § 5029.

We should hesitate in any case to give to sec. 1775, Stats. 1898, the meaning contended for by appellant's counsel. To say that the legislature intended to require corporate action by a majority vote of stockholders at some general meeting, or special meeting called for the specific purpose, as a condition precedent to every sale of corporate property, real or personal, so that every dealer with a corporation would be bound to inform himself as to whether such condition had been fulfilled, would convict the legislature of such an absurd piece of lawmaking that no court would venture to do it without first seeking diligently for some construction of the law within the reasonable scope of the language used that would avoid such meaning. Corporations, in the very nature of things, as to their ordinary affairs, must be permitted to conduct business the same, substantially, as individuals. The confusion that would result from a law that would invalidate every transfer of corporate property, real or personal, unless the act of the corporate officers in the transaction could be referred for authority to some specific vote of a majority of the stockholders formally authorizing it, would be incalculable. The whole trend of modern decisions is against impeachment of executed corporate transactions except by punishment of the corporation at the suit of the state.

Waiving the question of whether a vote of stockholders was necessary in this case in order to strictly comply with the law, the presumption of due authority, arising from the acts of the corporate officers and the consent individually given by all the stockholders, is so strong that it cannot be overcome by mere proof that formal action was not taken as to the particular transaction. General authority, regularly given by stockholders of a corporation to its officers,

to act in the sale of property and convey the same accordingly in the transaction of corporate business, would satisfy the statute.

By the Court.— The judgment of the circuit court is affirmed.

NELSON, Plaintiff in error, vs. THE STATE, Defendant in error.

September 10 — September 24, 1901.

Criminal law: Intoxicating liquors: Sale to minors: "Dealing" or "trafficking": Construction of statutes.

1. If an adult accompanied by a minor applies to a saloonkeeper for liquor to be drank by him and his associate at his expense, and the saloonkeeper furnishes it for that purpose, and it is drank by the two, the adult treating his companion, the vendor is guilty of *dealing* or *trafficking* in liquor with a minor, within the meaning of sec. 1557, Stats. 1898.
2. Strict construction of a penal statute permits sensible construction, having in view the purpose of the law; and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof.

ERROR to review a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Plaintiff in error was convicted of violating sec. 1557, Stats. 1898. The charge against him was that he unlawfully sold, vended, dealt, and trafficked in intoxicating liquor, in that he gave away such liquor to one John Swanson who was at the time thereof a minor. The evidence was to the effect that the accused, *Thomas Nelson*, was a licensed dealer in intoxicating liquor, and that Swanson, a minor as alleged, drank such liquor obtained of *Nelson* at his bar; that Swanson entered *Nelson's* saloon with two adult acquaintances for the purpose of obtaining intoxicat-

ing liquor to be there drank; that *Nelson* and his bartender were behind the bar; that one of Swanson's associates applied for drinks for all of the persons in the room, including Swanson; that the application was granted, *Nelson* assisting in dealing out the liquor; that other drinks were thereafter ordered by Swanson's associates, of which Swanson partook at their invitation, on one occasion *Nelson* personally handing the drink, which was whisky, to Swanson; that Swanson did not pay for any of the drinks; that he received the liquor which he drank by the favor of his associates.

The court instructed the jury that, "if defendant sold and delivered liquor to one of the parties there with Swanson, and such party treated Swanson, the minor, then this would not make defendant liable for selling or vending. But such acts would render the defendant liable under the other comprehensive words, 'in any way deal or traffic in' intoxicating liquors, 'to or with a minor.'" "If defendant set out this liquor intending to give it to Swanson to drink, and the latter did drink it, you may find this was a dealing or trafficking in liquor to or with this minor, within the meaning of these terms as used in the statute." Exceptions were duly taken to such instructions.

For the plaintiff in error there was a brief by *G. M. Perry* and *J. G. Forbes*, and oral argument by *Mr. Perry*. They contended, *inter alia*, that where a minor and an adult go together to a liquor saloon, and the adult calls for liquor, and it is furnished to both, and both drink, the sale is to the adult, and the dealer cannot be indicted for selling to a minor. *Ward v. State*, 45 Ark. 351; *Siegel v. People*, 106 Ill. 89. Neither, in such a case, can the seller be charged with giving away liquor to the minor. *Kurz v. State*, 79 Ind. 488.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *E. N. Warner*, law examiner. They cited *Page v. State*, 84 Ala. 446; *State v.*

Scoggins, 107 N. C. 959, 10 L. R. A. 543; *People v. Neumann*, 85 Mich. 98; *State v. Best*, 111 N. C. 638; *Foster v. State*, 45 Ark. 361; *Topper v. State*, 118 Ind. 110.

MARSHALL, J. The only material question sufficiently presented by the record to permit us to consider it is, Did the trial court err in instructing the jury, in effect, that if an adult accompanied by a minor applies to a dealer in intoxicating liquor at his saloon for such liquor, to be drank by him and his associate at his expense, and the dealer furnishes it for that purpose, and it is drank by the two, the adult treating his companion, the vendor is guilty of dealing or trafficking in intoxicating liquor with a minor, within the meaning of sec. 1557, Stats. 1898, which says that "any keeper of any saloon . . . for the sale of any strong, spirituous or malt liquors to be drank on the premises, in any quantity less than one gallon, who shall sell, vend or in any way deal or traffic in or . . . give away any spirituous, ardent, intoxicating or malt liquors or drinks in any quantity whatsoever to or with a minor . . . shall be punished," etc.? Counsel for plaintiff in error cite to our attention authority in support of their assignment of error, and the attorney general refers to many authorities in support of a contrary view. We do not deem it necessary to review such authorities at length, because the statutes considered therein are not as broad and comprehensive as the statute of this state upon which the challenged instruction was based. However, a brief reference to some of such authorities and others will show that, as a rule, courts have been inclined to give such construction to statutes aimed at preventing the use of intoxicating liquors by minors as will fully carry out the legislative purpose in that regard so far as reasonably expressed, even though it requires a departure from the literal or ordinary meaning of words.

In *State v. Freeman*, 27 Vt. 520 (opinion by REDFIELD, C. J.), *furnishing* liquor to a minor by a dealer was held to include *giving* liquor to him. In *Dukes v. State*, 77 Ga. 738, it was contended that the word "furnish" contemplates a sale, but the court held that it was used in the Georgia statute in its broad sense and included giving. In *Comm. v. Davis*, 12 Bush, 240, the word "give" was held to mean, in its strict sense, the bestowal of something of value by one person upon another as a gratuity, but that as used in the Kentucky statute in regard to giving intoxicating liquors to minors, it was used in connection with the word "sale" and the word "loan" so as to include the other methods of enabling a minor, by the aid of another, to procure intoxicating liquor. In that case the accused purchased liquor with money belonging to himself and the minor, and then delivered part of the joint property to the minor for his use. The court said, in effect, that to give to the words of the statute their strict primary signification would render it ineffective and defeat the plain legislative purpose thereof by enabling minors to readily procure intoxicating liquor by using a purchasing agent to obtain it of the dealer with their money, and that such a result was so foreign to the manifest purpose of the legislature that the court would not adopt a construction that would lead to it if one could be found within the reasonable scope of the language of the statute which would prevent it. To the same effect are *Walton v. State*, 62 Ala. 197; *Topper v. State*, 118 Ind. 110; *State v. Scoggins*, 107 N. C. 959; *State v. Munson*, 25 Ohio St. 381. In the last case cited it was held that if an adult accompanied by a minor applies at the counter of a saloon for liquor to be drank by him and his associate at his expense, and the person in charge hands out the article applied for by turning out a drink for each, such person is guilty of furnishing liquor to a minor under the statute prohibiting it; that though in a sense the adult furnishes the liquor, the dealer,

by supplying it under the circumstances, in legal effect furnishes it to the minor the same as the purchaser, upon the principle that all persons participating in the commission of a misdemeanor are principals. In *Walton v. State, supra*, it was said that inventions and attempted evasions of the law cannot succeed by invoking the rule of strict construction, where the real purpose of the legislature is plain and the reasonable meaning of the words used is broad enough to prevent it; and that all persons knowingly participating in providing intoxicating liquor to be drank by a minor are guilty of furnishing it to him within the meaning of the statute; that the one who sells the liquor to enable the vendee to give it to the third person who is a minor is guilty as well as the vendee.

A contrary view was expressed in *Siegel v. People*, 106 Ill. 89, and seems to have been adopted without study of the subject in Black, Intoxicating Liquors, § 406. Such view was criticised in *People v. Neumann*, 85 Mich. 98, the court saying that the reasoning upon which it was based was unsatisfactory and could not be adopted without careful consideration even if a statute like the Illinois law were under consideration, and not at all as to the more comprehensive law of Michigan. In the Michigan case, a law prohibiting the furnishing of liquor to a minor was held to be violated by the sale of liquor to an adult to be furnished to the minor by treating him, as in this case, the decision being based in whole or in part on the principles which rule the cases to which we have referred.

Our statute is broader even than the Michigan law or any considered in such cases. In addition to the prohibition of a person circumstanced as plaintiff in error was from selling or giving away intoxicating liquor to minors, any dealing or trafficking therein with them is prohibited. The word "deal" was obviously used *ex industria* to include all acts directly with minors in furnishing intoxicating liquors

to them. The word "deal," as applied to intercourse *inter partes*, includes any transaction of any kind between them. Webst. Dict. The act of setting out liquor for another to drink at the request of a third person is a dealing with such other as clearly as giving or selling it to him. So "deal" includes the terms ordinarily used in statutes held, as we have seen, to cover the act complained of, and every other transaction with a minor to enable him to obtain liquor at a saloon bar. The legislative purpose is plain,— to prevent, so far as practicable, minors from becoming victims of the corrupting influence of the saloon, and to leave as little room as possible for evasions of such purpose. To that end language was used covering every transaction with a minor inconsistent with such purpose, and it is the duty of the court to give full effect to that wise policy so far as reason will permit. That is consistent with the doctrine that penal statutes and those contrary to the common law should be strictly construed, because strict construction of a law always permits sensible construction, having in view the purpose of the law to be construed; and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof. Moreover, as we have indicated, the instruction given by the court, of which complaint is made, is in accord with the primary sense of the words of our statutes forming the subject of the instruction. In this case plaintiff in error not only handed out the liquor to be drank by the minor, but actually placed the filled glass in his hands, thereby *dealing* with him in the strictest sense of the term, even though it was done at the request and at the expense of another. We see no ground for criticising the instruction complained of.

By the Court.— The judgment of the circuit court is affirmed.

111 400
117 453

GILMAN, Receiver, Appellant, vs. DRUSE, Respondent.

September 6 — October 15, 1901.

Statutes: Repeal by implication: Mutual hail insurance: De facto *corporation: Estoppel:* Ultra vires: *Assessments: Unauthorized purposes.*

1. Secs. 1956–1966, R. S. 1878, authorized the formation of corporations to transact the business of mutual insurance against loss or damage by hail to all kinds of "grain, fruits, hops, and legumen." Ch. 329, Laws of 1895, authorized the formation of mutual companies to insure against loss and damage to farm buildings, stock, and crops by hail, tornadoes, cyclones, or hurricanes, with greater powers than those granted by secs. 1956–1966, but the act contained no clause expressly repealing said sections, and both acts were substantially incorporated into the revision of 1898. *Held*, that the act of 1895 was not a revision of the whole subject matter of insurance against hail, and did not by necessary implication repeal secs. 1956–1966.

2. Articles of incorporation of a mutual hail insurance company organized under secs. 1956–1966, R. S. 1878, were signed in the body of the instrument instead of at the end, and no certificate of acknowledgment was attached as required by law, but the preamble recited that the signers thereby acknowledged and adopted said articles. The incorporators, business men not learned in the law, employed an attorney, who drew up the articles and subsequently advised them in making their by-laws, etc. The incorporators immediately organized and commenced the transaction of a large business in the corporate name. *Held*, a *bona fide* attempt to comply with the law, and that there was at least a *de facto* corporation.

3. One who deals with a *de facto* corporation as a corporation is estopped to question the validity of its organization, at least so far as transactions within its supposed corporate powers are concerned.

4. The provisions of secs. 1957, 1962, Stats. 1898, that all persons insured in a mutual hail insurance company shall be members of the corporation "during the current year in which they have insured, and until and including the second Monday of March thereafter," and that if the premiums "in any one year shall be insufficient to pay losses, such a corporation may levy an assessment upon each member thereof, in proportion to the amount insured, to cover such deficiency," contemplate one assessment for each year upon all persons insured during that year; and such assessment is therefore not to

be confined to policy holders who were such at the time the losses which it represents occurred.

5. *It would seem* that a statute authorizing the formation of corporations to insure "all kinds of grain, fruits, hops, and legumen" does not authorize the insurance of crops of tobacco.

6. Where the articles of incorporation and the by-laws of a mutual company organized under such a statute were printed on each policy and stated that one of the purposes of the corporation was to insure tobacco, the policy holders took their policies charged with knowledge that the company proposed to insure tobacco, and cannot question its acts in that regard.

7. Assessments upon the members of mutual insurance companies must be limited to the objects declared by law, and to the reasonably necessary expenses of collection, with a reasonable allowance for probable failure to collect a part thereof.

8. Sec. 1962, S. & B. Ann. Stats. (providing that if the amount of premiums received in any one year by a mutual hail insurance company be insufficient to pay the losses, such corporation may levy an assessment to cover such deficiency), when construed in the light of other provisions contemplating the exaction of cash premiums, substantial in amount, out of which the general expenses of conducting the business shall be paid, authorizes an assessment for one purpose only, i. e. the payment of losses; and the inclusion of a considerable amount for the express purpose of paying ordinary expenses renders the assessment invalid.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action brought by the plaintiff, as receiver of a mutual hail insurance company, to collect an assessment alleged to be due from the defendant to the company, which was levied by the company prior to the appointment of the plaintiff as receiver.

It appeared by the evidence that the United Farmers' Township Mutual Hail Insurance Company was attempted to be organized as a mutual hail insurance corporation in the year 1898, under secs. 1956–1966, R. S. 1878, as amended. The supposed articles of incorporation began as follows:

"Know all men by these presents, that we, W. G. Williams, W. McBride, C. F. Paige, J. F. Paige, and Samuel S.

Spedden, desiring to form a corporation for the purpose of transacting the business of mutual insurance against loss or damage by hail, and to all kinds of grain, fruits, hops, and legumen, pursuant to section 1956 of the Revised Statutes of the State of Wisconsin for the year 1878, together with all the additions and amendments thereto, do hereby for such purpose associate ourselves together as a body corporate, and do hereby acknowledge and adopt the following declarations and articles."

After this preface follows article 1, which states the name and location of the company; article 2, which states the general nature of the business to be conducted, and article 3, which reads as follows: "The names and places of residence of the persons associating hereby for the purpose of forming this corporation are as follows." Then follow the names of the five organizers of the company, the same being the signatures of the said parties, signed at this place in the articles instead of at the end. After these signatures follow eight further articles. Attached to these articles there was a certificate of the alleged incorporators that the same was a true copy of the original articles, added to which was an affidavit by said incorporators to the truth of the certificate.

These supposed articles of incorporation were duly filed with the commissioner of insurance May 9, 1898, and the company thereafter organized and elected officers, and proceeded to the transaction of business in a number of counties in this state. It issued a large number of policies insuring crops against damage by hail, amounting in the aggregate to $1,088,879. During the season of 1898 there were a large number of hail losses, and claims were filed with the company for about $134,000, which the evidence tended to show were adjusted at the sum of $23,206.16. At a meeting of the directors of the company held September 15, 1898, an assessment of five per cent. was assessed against all of the policy holders for the payment of the losses so adjusted, as well as certain unpaid expenses of the company in transact-

ing business, which, it is claimed, amounted to $14,316.01. Subsequently, upon examination of the books and accounts of the company, and upon recommendation of the commissioner of insurance, on the 10th of October, 1898, this assessment was reduced from five per cent. to four per cent., which, if paid in full, would produce the sum of $43,500. It appears that the salaries of the officers of the company had not been fixed prior to the first assessment, and that on the 24th of September, 1898, the salaries of the officers were fixed as follows: President, $2,500; secretary, $1,500; general agent, not exceeding $600; assistant treasurer, $600; and attorney, $200.

The testimony further shows that June 9, 1898, the defendant made application for insurance of certain crops, and paid the membership fee, and received a policy insuring his crops in the sum of $1,000, and retained such policy until November, 1898, after the crops were harvested; that he sustained no loss; and that he received timely notice of the assessment and of its reduction. It was admitted that he never paid the assessment. The company being insolvent, the plaintiff was, upon due proceedings had, appointed receiver on the 23d day of May, 1899, and was authorized to collect, sue for, and recover as such receiver all debts and demands, including all assessments that might be due the company. The plaintiff duly qualified as receiver, and is still acting. No money was turned over to the receiver from the company, and he had no way of adjusting claims except to collect the assessments levied by the company and remaining unpaid.

A nonsuit was granted by the court at the close of the plaintiff's case, and from judgment of dismissal the plaintiff appeals.

For the appellant there was a brief by *Erdall & Swansen* and *Clancey & Loverud*, and oral argument by *J. L. Erdall.* They argued, among other things, that ch. 329, Laws of

1895, is an independent act passed for the purpose of authorizing the formation of mutual insurance companies to transact a general hail, tornado, cyclone, and hurricane business. It did not therefore repeal the former act by implication. *Vorous v. Phenix Ins. Co.* 102 Wis. 76; *Golonbieski v. State*, 101 Wis. 333; *Bentley v. Adams*, 92 Wis. 386; *Gilkey v. Cook*, 60 Wis. 133; *Bernhardt v. Rice*, 98 Wis. 578; *State ex rel. Ennis v. Janesville*, 90 Wis. 157, 159; 23 Am. & Eng. Ency. of Law (1st ed.), 486; *Wood v. U. S.* 16 Pet. 363; *Chicago, M. & St. P R. Co. v. U. S.* 127 U. S. 406; *Frost v. Wenie*, 157 U. S. 46, 58; *U. S. v. Healey*, 160 U. S. 146; *U. S. v. Greathouse*, 166 U. S. 605; *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 514; *Att'y Gen. v. R. R. Cos.* 35 Wis. 425; *Dane Co. v. Reindahl*, 104 Wis. 302, 305.

For the respondent there was a brief by *James A. Stone* and *Grotophorst, Evans & Thomas*, and oral argument by *Mr. Stone*. They contended, *inter alia*, that the law of 1895 by implication repealed the former law, because it revised the whole subject matter. 23 Am. & Eng. Ency. of Law, 487; *State v. Campbell*, 44 Wis. 529; *Dane Co. v. Reindahl*, 104 Wis. 302; *State ex rel. Ennis v. Janesville*, 90 Wis. 157; *Burlander v. M. & St. P. R. Co.* 26 Wis. 76; *Schneider v. Staples*, 66 Wis. 167; *Moore v. S. & St. C. R. Co.* 34 Wis. 173; *Oleson v. G. B. & L. P. R. Co.* 36 Wis. 385; *Curry v. C. & N. W. R. Co.* 43 Wis. 665. The fact that the law of 1895 includes the terms tornadoes, cyclones, or hurricanes is immaterial. An insurance company could be formed under ch. 329, for the purpose of mutual insurance against loss or damage by hail alone. If that is so, and secs. 1956 *et seq.* were in force, hail insurance companies organized for the same purpose could be organized under two entirely inconsistent methods. The legislature having used the disjunctive *or*, the court must construe the statute with reference thereto. *Williams v. Citizens' E. Co.* 25 Ind. App. 351. In mutual companies it is impossible to make a valid

assessment that does not take into consideration the number of policy holders at the time each loss occurs. *Davis v. Parcher & J. & A. S. Co.* 82 Wis. 499; May, Insurance, § 559; Beach, Insurance, § 114; 32 L. R. A. 488, note; *Bowen v. Kuehn*, 79 Wis. 53; *Great W. T. Co. v. Burnham*, 79 Wis. 47; *Detroit M. M. F. Ins. Co. v. Merrill*, 101 Mich. 393.

WINSLOW, J. It does not appear in the record upon what ground or grounds the nonsuit in this case was based, but respondent's counsel argue that the ruling was correct, (1) because the mutual hail insurance company of which the plaintiff is receiver never was a legal corporation; and (2) because, even conceding that it was a legal corporation, the assessment upon which this action was founded is void.

1. The mutual hail insurance company in question was attempted to be organized as a corporation under the provisions of ch. 196, Laws of 1876, which now appears, with some changes, as secs. 1956–1966, Stats. 1898. This act, as condensed and codified by secs. 1956–1966, R. S. 1878, provided that any number of residents of this state, not less than five, might file in the office of the secretary of state (afterwards changed to the commissioner of insurance by ch. 194, Laws of 1879) a declaration, "signed and acknowledged" by them, expressing their desire to form a corporation to transact the business of mutual insurance against loss or damage by hail to all kinds of "grain, fruits, hops, and legumen," and setting forth the name of the corporation, the location of its principal office, and the names of its first board of directors; and that every such corporation should possess the usual powers of a corporation for the purposes specified. The act also contained provisions for the election of officers, their duties, and the bonds to be given by them; granted to such corporation the power to make contracts of insurance against loss by hail, to levy assessments upon

members in case of necessity, to accumulate a reserve fund, to divide profits in excess of the reserve fund among the members; and required the making of annual reports to the insurance commissioner.

In the year 1895 another law was passed, authorizing the formation of mutual insurance companies against loss by hail, tornadoes, cyclones, or hurricanes. Ch. 329, Laws of 1895. By this law any number of residents of Wisconsin, not less than 100, collectively owning real estate therein of not less than $250,000 in value, were authorized to incorporate for the purpose of mutual insurance against loss or damage by hail, tornadoes, cyclones, or hurricanes. This act contained full provisions as to the manner of formation and the conduct of the business of such corporations, and conferred upon them power to issue policies insuring property against loss and damage by hail, tornadoes, cyclones, or hurricanes, but provided that they should insure no property other than detached dwellings, farm buildings and their contents, and live stock while on the premises or running at large, and hay, grain, and all other products while growing or while in the shock, stack, bin, crib, granary, or other buildings upon such premises. This act is now substantially contained in secs. 1966—2 to 1966—12, Stats. 1898. It contained no clause expressly repealing the mutual hail insurance company law, nor was there any section in the revision of 1898 expressly repealing such law, but, on the contrary, such law was reincorporated into the general law of the state by that revision. The respondent's contention is, however, that the law of 1895 repealed the former law by necessary implication, because it is a revision of the whole subject matter thereof. We find ourselves unable to agree with this view of the matter. It is well settled that a repeal by implication is not favored in the law, and that, when two acts on the same subject may well subsist together, there will be no such repeal. *Dane Co. v. Reindahl*, 104 Wis. 302.

It is really a question of intention of the legislature. There does not seem to us to be any good ground for saying that the act of 1895 shows any intention of superseding the former act, or that it is, in substance or effect, a revision of such former act. The act of 1895 seems to have been passed for the purpose of providing for the organization of companies with greater powers than the companies organized under the previous act. It was evidently desired that there should be opportunity for cheap and mutual protection of nearly all farm property against the loss by tornadoes or hail; while the former law only provided for mutual protection of growing crops against loss or damage by hail. There is no reason apparent why the two laws may not well co-exist, leaving it optional with persons intending to form such a corporation whether they will form one with simply the narrow and limited power of insuring growing crops against hail, or one with the greater power of insuring all kinds of farm property against windstorms or hail, or both. The absence of any express repealing clause, either in the act of 1895 or in the revision of 1898, as well as the fact that the prior law is inserted in full in the revision in immediate connection with the law of 1895, are both very strong indications that there has been no intention on the part of the legislature to repeal such prior law. We conclude, therefore, that the law under which the mutual hail insurance company under consideration here was attempted to be incorporated was a valid existing law in May, 1898, when the articles of incorporation were attempted to be filed.

The principle is familiar that, where there is a valid law under which a supposed corporation might lawfully have been incorporated, and an attempt in good faith to comply with the law, and the corporation attempted to be organized actually engages in the transaction of its appropriate business, it becomes a *de facto* corporation, though, by a failure

to comply with some statutory requirement, it may not be a corporation *de jure*. *Gilkey v. How*, 105 Wis. 41. We have been unable to see how it can be said that there was not an attempt in good faith to comply with the law in organizing the supposed insurance company before us. It is true that the articles of incorporation were not signed at the end by the corporators, and that no certificate of acknowledgment was attached; but it does appear, however, that they placed their autograph signatures in the body of the instrument, and that the instrument in its preamble recites that they hereby "acknowledge and adopt" said articles. Moreover, it is shown that the corporators were all business men, not learned in law; that they employed an attorney to draw, and who did in fact draw, the articles, and subsequently advised them in making their by-laws and transacting their business; and that they immediately organized and commenced the transaction of a large business in the corporate name. Every fact points to an honest belief on their part that they had formed a valid corporation, and we therefore conclude that the corporation was at least a *de facto* corporation. Being such, and the defendant having dealt with it on that basis, he is estopped from saying that there was no legal corporation, at least so far as transactions within its supposed corporate powers are concerned. *Slocum v. Head*, 105 Wis. 431. So the argument that there can be no recovery here because the supposed corporation was not legally incorporated falls to the ground.

2. As to the validity of the assessment, the first claim of the respondent is that it was invalid because it was a horizontal assessment levied upon all policy holders, and not confined to policy holders who were such at the time the losses which it represents occurred. *Davis v. Parcher & J. & A. Stewart Co.* 82 Wis. 488. This argument would be strong and perhaps controlling, were it not for the provision of the statute (sec. 1962, Stats. 1898) which declares

that, if the amount of premiums received for insurance "by any such corporation in any one year shall be insufficient to pay the losses, such corporation may levy an assessment *upon each member thereof*, in proportion to the amount insured, to cover such deficiency." Sec. 1957 provides also that all persons insured shall be members of the corporation "during the current year in which they have insured, and until and including the second Monday of March thereafter." The statute seems to contemplate and require one assessment for the year upon all persons insured during that year, and this was what was done in the present instance.

It is next contended that the company was not authorized to insure crops of tobacco, and that, because it appears that the company did insure tobacco, and a large proportion of the losses were for damage to tobacco, the assessment is void.

The law, as it stood when this company was organized, probably did not authorize the insurance of crops of tobacco. It authorized simply the insurance of "all kinds of grain, fruits, hops, and legumen." In the revision of 1898 the word "grain" was changed to "crops," but, as this statute did not go into effect until September 1, 1898, the change has no bearing upon the questions involved in this case.

However, if, as seems probable, the acts of the corporation in insuring crops of tobacco were *ultra vires*, it avails the defendant nothing in this action. The company was a mutual company, and the defendant, by insuring therein, became one of its members. Both the articles of incorporation and the by-laws (which were printed on each policy) stated that one of the purposes of the corporation was to insure tobacco. The defendant was one of the insurers, as well as the insured, and he took his policy charged with knowledge of the fact that the company proposed to insure tobacco. In legal effect he himself participated in the transaction of such business, and it is difficult to see how he

can now be heard to question such acts. The company could not urge the defense of *ultra vires* to any of the claims for losses upon such crops of tobacco. This doctrine is now well settled in this court. *Bigelow v. C., B. & N. R. Co.* 104 Wis. 109. Such losses were, therefore, legal liabilities of the company, which the defendant joined in incurring, and which he cannot question.

The final contention made by the respondent is that the assessment is excessive, and not based upon the actual amount of losses which the company was obliged to meet. This is the most serious question raised upon this appeal. The evidence submitted by the plaintiff tends to show that the losses sustained by the company had been adjusted, at the time the assessment was made, at the sum of $23,206.16. There is also evidence of a very weak and unsatisfactory nature that there was then an outstanding indebtedness for expenses of the business amounting to more than $14,000. This sum included, apparently, an allowance of more than $5,000 for salaries of officers, which were not in fact fixed until nine days after the assessment was made. Thus there is claimed to have been a total indebtedness of nearly $38,000. The assessment (as finally reduced) would net, if fully collected, $43,550, and it is argued by appellant that the excess of the assessment over the liabilities is no more than reasonably sufficient to provide against shrinkage and expenses of collection. *Davis v. Shearer*, 90 Wis. 250. While it is entirely true that such allowance for shrinkage may lawfully be made and if it is reasonable in amount the assessment will be valid, it is equally true that, if an assessment which is unreasonably large and out of proportion to the amount of liabilities to be paid be heedlessly levied, such assessment will amount to a fraud upon the policy holders; and it is also true that if an assessment be levied, any substantial part of which is for purposes for which an assessment is not authorized, the entire assessment will be

invalidated. *Rosenberger, L. & Co. v. Washington M. F. Ins. Co.* 87 Pa. St. 207. Assessments must be limited to the objects declared by the law, and to the reasonably necessary expenses of collection, with a reasonable allowance for probable failure to collect a part thereof. *Id.*

Turning now to the law under which this company was incorporated, we find that by sec. 1962, S. & B. Ann. Stats., assessments are authorized for one purpose, and only one, namely, the payment of losses. The section cited says that, if the amount of premiums received in any one year be insufficient to pay *the losses*, such corporation may levy an assessment to cover such deficiency. The word *losses* can mean but one thing in this connection, and that is losses occurring by reason of its insurance risks. While this section does not say, in so many words, that the expenses of the business shall be paid out of the cash premiums received, we think there can be no doubt that such is the intent and proper construction of the law. The very general, and in fact universal, practice on the part of insurance companies of paying agents and operating expenses out of the cash premiums received is to be considered in construing the law. It may well be that it did not seem necessary to the legislature, in view of such custom, to make any special statement that expenses were to be paid out of the cash receipts; but there are clear indications of the legislative intent in other parts of the law. That such companies were expected to charge and collect cash premiums is certain, and we think it is apparent also that it was contemplated that such premiums should be substantial in amount, and should be the fund from which the general expenses of conducting the business were to be paid. This latter intent appears from the provisions of sec. 1963, which declares that "the *net* profits of any such corporation shall constitute a reserve fund, of which not more than one half shall ever be drawn for the payment of losses," etc. Profits are

not the result of assessments, but must be the result of the regular and ordinary business of the corporation,—i. e. the proceeds of cash premiums collected; and *net* profits can mean nothing more nor less than the excess of such premiums over the expenses of the business and the amount of losses. So the legislative intention that the expenses of the business shall be paid out of the cash premiums received is manifest.

But, on the other hand, the power to make an assessment is to be strictly construed. An assessment can only be made for the purposes which the law authorizes. The law before us only authorizes the levy of an assessment to pay such part of the losses as the premiums received in any year prove insufficient to pay. There is no authority given in the statute to levy assessments to pay general expenses of the conduct of the business. It may well be that the necessary expenses of adjusting the losses should be considered as a part of the losses which may be paid from the assessment, as well as the expenses of making and collecting the assessment itself, but further than this there is no warrant for going. A precisely similar situation was presented in the case of *Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240, where the court held that the statute only authorized the making of an assessment to pay losses, and that, an assessment having been made to meet a large amount of expenses as well as losses, it was unauthorized and created no liability. Some of the remarks of the court in that case are so pertinent here that they may be quoted with profit:

"It is quite apparent that the purpose of the legislature was to protect policy holders from assessments for the mere purpose of paying the salaries of officers, fixed by themselves, and thus compel the exaction of a sufficient cash premium to meet current expenses, at least. This makes the premium note sacred to the purpose of indemnity of members against losses by fire; tends to a prompt and cheerful payment of assessments, because of the certainty that the

money will go exclusively to the payment of losses and cannot lawfully be used for any other purpose; and lawfully protects the public from the depredations of institutions conducted with a view merely to the aggrandizement of their managers."

It appears in the present case by the very words of the resolution levying the assessment, as well as by the direct testimony of one of the officers who made it, that it was expressly made to cover the $14,000 of unpaid general expenses of the business as well as to pay the $23,000 of losses. We cannot doubt that this was unauthorized, and constituted such a gross mistake as to amount to a fraud, and hence invalidated the assessment.

This leaves the situation open for the receiver to take such steps as may be necessary in order to make a proper assessment to pay the losses of the company.

By the Court.— Judgment affirmed.

OGDEN, Plaintiff in error, vs. THE CITY OF MADISON, Defendant in error. 111 413 / 113 * 24

September 9 — October 15, 1901.

Municipal corporations: Madison city charter: Disorderly houses: Offense punishable also under statute: Recovery of penalty: Jury trial: Constitutional law.

1. Sec. 3, subch. IV, ch. 36, Laws of 1882, gives the common council of Madison power to enact ordinances for the government and good order of the city, for the suppression of vice and immorality, for the prevention of crime, etc., declaring and imposing penalties, and to enforce the same against any person violating such ordinances. Subd. 1 of the same section grants the power to provide for the abatement of nuisances, and subd. 3 to *suppress and restrain* disorderly houses and houses of ill-fame; and subd. 5 declares houses of ill-fame and disorderly houses to be nuisances. *Held*, that the city has power thereunder to prescribe and enforce a penalty against the keeper of a disorderly house or house of ill-fame.

2. A prosecution by the city in such case to recover the penalty imposed by an ordinance against disorderly houses is a prosecution for an offense against a mere police regulation for the good order of the city, and not a prosecution for a misdemeanor, even though the same act constitutes a misdemeanor under the general statutes; and the defendant is not entitled to a jury trial under the constitutional guaranty, but may be proceeded against summarily.

ERROR to review a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This action was commenced in the municipal court of Dane county on a complaint charging the plaintiff in error with having been guilty of "keeping and maintaining a disorderly house and house of ill-fame," contrary to the provisions of sec. 4, ch. 7, of the ordinances of the city of *Madison.* A warrant for his arrest was issued, and he was arrested and taken before the court. A plea of not guilty was entered, and a trial was had before the court without a jury. He was found guilty, and was adjudged to pay a fine of $100 and costs, or, in default of the payment of such fine and costs, that he be committed to the county jail of Dane county at hard labor until said fine and costs were paid,— not, however, to exceed ninety days. An appeal was taken to the circuit court, where a trial was had before a jury, and a verdict of guilty rendered. A similar fine, with costs, was imposed, with imprisonment in the county jail not exceeding three months in case of nonpayment. The accused brings the case to this court by writ of error.

H. W. Chynoweth, for the plaintiff in error, to the point that plaintiff in error could not be convicted of this offense by the court alone without a jury, cited secs. 3294, 3303, Stats. 1898; *State v. Lockwood*, 43 Wis. 403; *In re Staff*, 63 Wis. 285; *Sutton v. McConnell*, 46 Wis. 269; *Boscobel v. Bugbee*, 41 Wis. 59; *Oshkosh v. Schwartz*, 55 Wis. 483; *State v. Grove*, 77 Wis. 448; *Milwaukee v. Simons*, 93 Wis. 576; *Milwaukee v. Weiss*, 93 Wis. 654; *State v. Hayden*, 32 Wis. 663; 1 Dillon, Mun. Corp. (4th ed.), §§ 432, 434, 439; *State*

v. Moss, 2 Jones, Law, 66; *Rector v. State*, 6 Ark. 187; *Slaughter v. People*, 2 Doug. (Mich.), 334; *Welch v. Stowell*, 2 Doug. (Mich.), 332; *Burns v. La Grange*, 17 Tex. 415; *Warren v. People*, 3 Parker, Cr. 544; *Zylstra v. Charleston*, 1 Bay, 382; *Barter v. Comm.* 3 Pa. 253; *Byers v. Comm.* 42 Pa. St. 89; *Callan v. Wilson*, 127 U. S. 540; *Durkee v. Janesville*, 28 Wis. 464.

John A. Aylward, city attorney, for the defendant in error, argued, among other things, that an offense against a city ordinance, even though the acts complained of also constitute a crime, misdemeanor, or common-law or indictable offense, may be disposed of in the first instance summarily without a jury. *State ex rel. Milwaukee v. Newman*, 96 Wis. 258, 266; *Platteville v. McKernan*, 54 Wis. 487; *Platteville v. Bell*, 43 Wis. 488; Anderson, Law Dict. "QUASI-CRIMES;" *Wiggins v. Chicago*, 68 Ill. 372, 375; *State v. Lee*, 29 Minn. 445, and cases cited; *McGear v. Woodruff*, 33 N. J. Law, 213; *Jones v. Robbins*, 8 Gray, 329; 24 Am. & Eng. Ency. of Law, 500, 504; Cooley, Const. Lim. (6th ed.), 389, note 2 and cases cited; 1 Dillon, Mun. Corp. (4th ed.), §§ 432–439; Bishop, Statutory Crimes, § 23; 1 Bishop, Criminal Procedure, § 892; Pomeroy, Const. Law, § 246; *Mayor of Mobile v. Allaire*, 14 Ala. 400; *Mayor of Mobile v. Rouse*, 8 Ala. 515; *McInerney v. Denver*, 17 Colo. 302; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; *Hill v. Dalton*, 72 Ga. 319; *Davenport v. Bird*, 34 Iowa, 524; *Waldo v. Wallace*, 12 Ind. 569, 584; *Amboy v. Sleeper*, 31 Ill. 499; *Robbins v. People*, 95 Ill. 175; *Mayor of Monroe v. Meuer*, 38 La. Ann. 1192; *Emporia v. Volmer*, 12 Kan. 622; *State ex rel. Curtis v. Topeka*, 36 Kan. 76; *Williamson v. Comm.* 4 B. Mon. 146; *Kansas City v. Clark*, 68 Mo. 588; *St. Louis v. Cofferata*, 24 Mo. 96; *Johnson v. State*, 59 Miss. 543; *State v. Glenn*, 54 Md. 572; *Shafer v. Mumma*, 17 Md. 331; *Howe v. Plainfield*, 37 N. J. Law, 145; *Riley v. Trenton*, 51 N. J. Law, 498; *Liberman v. State*, 26 Neb. 464; *Brownville v.*

Cook, 4 Neb. 101; *Polinsky v. People*, 11 Hun, 390; *Rogers v. Jones*, 1 Wend. 238; *Wong v. Astoria*, 13 Oreg. 538; *Inwood v. State*, 42 Ohio St. 186; *Byers v. Comm.* 42 Pa. St. 89; *Greenville v. Kemmis*, 4 Mun. Corp. Cas. 523; *Anderson v. O'Donnell*, 29 S. C. 355; *Ex parte Schmidt*, 24 S. C. 363; *Trigally v. Memphis*, 6 Coldw. 382; *Thomas v. Comm.* 22 Grat. 912; *State v. Conlin*, 27 Vt. 318.

BARDEEN, J. Two propositions are presented for our consideration: (1) The city of *Madison* has no power to enact the ordinance under which the plaintiff in error was convicted; (2) the provisions of law providing for the summary trial of the accused without a jury are in violation of the constitution of the state and of the United States.

1. The first proposition must be determined upon a consideration of the powers granted the common council of the city of *Madison* under its charter (ch. 36, Laws of 1882), with the amendments thereto. Sec. 1, subch. I, says:

"The city of *Madison* shall have the general powers possessed by municipal corporations at common law and, in addition thereto, shall have the powers hereinafter specifically granted."

Sec. 3, subch. IV, provides that the common council shall "have full power to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and immorality, for the prevention of crime, and for the benefit of the trade, commerce and health, as it shall deem expedient; *declaring and imposing penalties*, and to enforce the same against any person or persons who may violate any of the provisions of such ordinance, rule or by-law, and such ordinances, rules and by-laws are declared to be and have the force of law: provided they are not repugnant to the constitution of the United States and of the state. . . ."

Subd. 1 grants the power to provide for the abatement and removal of nuisances under the ordinances or at common law. Subd. 3 is as follows:

"To prevent any riots, noise, disturbances or disorderly assemblances, *suppress and restrain* disorderly houses or groceries and houses of ill-fame, and to authorize the destruction of all instruments used for the purpose of gaming."

Sec. 5 of said subch. IV declares all "gambling houses, houses of ill-fame, disorderly taverns," to be public or common nuisances. Sec. 4 of ch. 7 of the city ordinances provides that, if any person shall voluntarily be guilty of keeping or maintaining any disorderly house or house of ill-fame, he shall, on conviction, be fined a sum not exceeding $100, and the further sum of $100 for each twenty-four hours such house shall be continued after the first conviction, or after such person shall have been ordered "to suppress, restrain or discontinue the same."

The argument is that the charter provisions noted give the common council no power to enact an ordinance *punishing* a person for keeping a disorderly house or house of ill-fame; that its power is limited to suppression and restriction. There can be no doubt of the rule that a municipal corporation possesses and can exercise only such powers as are granted in express words; such as are necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the declared objects and purposes of the corporation. 1 Dillon, Mun. Corp. § 89. If there is great doubt concerning the existence of the power, the corporation cannot exercise it. The books are full of cases in which this subject has been considered. The field has been explored from all directions. Some of the cases are narrow and technical in their construction of the powers granted, while others adopt a somewhat broader view. We get but scanty assistance from adjudged cases, because of the want of uniformity in the language used in granting the powers and the great variety of circumstances deemed proper to be considered in arriving at the legislative intent. Two cases presented for our consideration are deemed decisive of this

case in favor of the plaintiff in error. In *In re Lee Tong*, 18 Fed. Rep. 253, the power granted was "to suppress bawdy-houses, gaming and gambling houses." The ordinance forbade and declared it to be unlawful for any person to play any one of a long list of games of chance "for or with any thing of value," and provided that any person violating the ordinance should be punished by imprisonment or by fine or both. Lee Tong was arrested for gaming and convicted, and sought his release on *habeas corpus*. Judge DEADY held that the power "to suppress gaming" did not carry with it power to define and punish the crime of gaming. He laid some stress on the fact that the legislature had passed a law punishing gaming, and that in frequent amendments to the charter by the legislature power to *punish* for offenses had only been given in cases where the state law had not prescribed a penalty. This, he believed, showed a legislative intent, and, with the other circumstances, was sufficient to support the conclusion reached. He cites the other case (*Mt. Pleasant v. Breeze*, 11 Iowa, 399) relied on by counsel here as supporting his decision. This case holds that where the power granted was "to suppress" gambling it gave no power to enact an ordinance making gambling a misdemeanor and prescribing a punishment therefor. The city had no power to *punish* that which it was only authorized to *suppress*. In a subsequent case (*Chariton v. Barber*, 54 Iowa, 360) the court, in referring to this case, say:

"The decision is not without grave objections as to the reasons upon which it is based. But it has been accepted without question or challenge for more than nineteen years. We ought not, at this late day, disturb it."

They accordingly held that the power to suppress and restrain disorderly houses did not authorize the passage of an ordinance declaring the keeping of such a house a misdemeanor and imposing a punishment by fine and imprisonment for the offense. In the case of *Centerville v. Miller*, 57

Iowa, 56, the court say they are not disposed to extend the rule announced in the *Mt. Pleasant Case*, and remark that they "know of no more effective way of preventing the commission of an offense than a provision providing for its punishment." See *Centerville v. Miller*, 57 Iowa, 225.

We appreciate quite fully the difficulty the court found in following the early decision. It is based upon narrow and technical grounds. It leaves but a mere shadow where substance was necessary. It takes the spirit and the life from the law, and leaves but a feeble and flickering remnant. It must be assumed that the legislature intended that the words of the charter should have their usual and ordinary signification. The following definitions of the words "suppress" and "restrain" are instructive in this connection: Bouvier: "Suppress: To put a stop to when actually existing." Anderson: "To prevent; never, therefore, to license or sanction." Standard: "To put down or put an end to by force; overpower; crush; subdue." Century: "To overpower; subdue; put down; quell; crush; stamp out." Webster: "To overpower and crush; to overwhelm; to subdue; to put down; to repress; to destroy." As to the word "restrain," the lexicographers all agree that it means "to curb; to check; to repress; to debar; to prevent; to hinder." If these words are to be understood to have the meaning here ascribed to them, then it would seem clear that, when the power to suppress and restrain an act is given, the power to adopt such measures as are essential and incident to such express grant of power must follow. Without it the grant would be barren and futile. If the grant of power to suppress and restrain means that the corporation may overpower, crush, subdue, and prevent the evil aimed at, then certainly it may affix reasonable penalties for the commission of such act. As suggested by the Iowa court, we know of no better or more effective way of suppressing a disorderly house, or preventing or crushing them

out, than to provide a penalty against the keeper. The power to restrain houses of ill-fame would be barren indeed if no means of punishment could be prescribed and enforced. The charter expressly authorizes the council to declare and impose penalties for the breach of its ordinances. The penalty imposed by the ordinance is by fine. Imprisonment only follows in case the fine is not paid.

The case of *Schwuchow v. Chicago*, 68 Ill. 444, is somewhat instructive on the question above discussed. It holds that, where the power was granted to suppress groceries where liquor was sold, the city might absolutely prohibit sales, or license, as it pleased. The case of *Wong v. Astoria*, 13 Oreg. 538, is somewhat in point. Jennie Wong was prosecuted under a city ordinance as the keeper of a bawdy-house. The power given in the charter was to "suppress and prohibit." The validity of the ordinance was challenged. In disposing of this question the court says:

"The power to suppress and prohibit practices that are demoralizing and pernicious would be of little avail if it could not be vindicated. The offense directly affects the welfare of the city, and how could the latter suppress and prohibit it unless it had the right to adopt a by-law against it, and affix a penalty thereto?"

In *St. Louis v. Schoenbusch*, 95 Mo. 618, the power granted was "to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties." It was held that the city might legally adopt an ordinance prohibiting cruelty to animals, and enforce it by proper penalties. But we need not multiply cases. They only illustrate the diversity of opinion among courts in somewhat similar situations.

In this connection the plaintiff in error makes the further

argument that the ordinance is void because it conflicts with sec. 3294, Stats. 1898, which reads as follows:

"In all cases, not otherwise specially provided for by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment or by fine or imprisonment or is specially declared by law to be a misdemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine."

The claim is that the offense charged in the complaint in this action is a misdemeanor under the laws of this state, and therefore any procedure for its punishment, other than that which is applicable to misdemeanor, cannot stand. This argument is based upon an erroneous assumption. The offense charged in the complaint is not the same offense made penal by sec. 4589. It is a separate and distinct offense, as will be discussed and shown in a later portion of this opinion. Moreover, the word "fine," as used in sec. 3294, does not include penalties imposed for the violation of municipal ordinances. *Oshkosh v. Schwartz*, 55 Wis. 483. The ordinance does not provide for "fine and imprisonment" or for "fine or imprisonment." It simply says that the person found guilty of violating it shall, "on conviction, be fined." Imprisonment follows only upon neglect to pay the penalty. See *State v. Grove*, 77 Wis. 448. Without further elaboration, we hold that the provisions of the charter are broad enough to, and do, include the power to prescribe and enforce a penalty against the keepers of disorderly houses or houses of ill-fame.

2. The record shows that the plaintiff in error was arrested upon a warrant issued by the municipal court. He was taken before the judge, and was tried and convicted without a jury. He then took an appeal to the circuit

court, where he was tried by a jury and again convicted. It is now insisted that the offense charged was a misdemeanor under the laws of this state, and he could not be properly convicted in any other way than by the verdict of a jury in the municipal court. But is the prosecution here for a misdemeanor under the state law? It is true that the state law makes the keeping of a disorderly house known as a "house of ill-fame" a penal offense, and that the keeper thereof was indictable at common law. We may assume for the purpose of this decision that the person accused of such an offense was entitled to a jury trial when prosecuted under the state law. In *State ex rel. Milwaukee v. Newman*, 96 Wis. 258, this court said:

"It seems to be the clear weight of authority that an act may be a penal offense under the laws of the state, and that further penalties, under proper legislative authority, may be imposed for its commission by municipal by-laws or ordinances, and the enforcement of the one would not preclude the enforcement of the other."

That this proposition has most ample support may be seen by reference to the cases collected in Cooley, Const. Lim. 239, and 1 Beach, Pub. Corp. § 510. A few cases illustrative of the point we desire to make will now be noticed:

In *Mayor of Mobile v. Allaire*, 14 Ala. 400, a city ordinance imposed a fine for assault and battery, which was also punishable under the state law. The defendant was arrested and convicted under the city ordinance, and took an appeal. Pending his appeal he was prosecuted and fined under the state law, which fine he paid. On the trial of the case on the appeal the court charged the jury that the conviction under the state law was a complete bar to the plaintiff's recovery on the appeal. The supreme court disposed of the case in the following language:

"The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to

provide a mere *police regulation* for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the state tribunal has interfered and exercised its powers in bringing the defendant before it to answer for the assault and battery, for whether he has been there punished or acquitted is alike unimportant. The offenses against the corporation and the state, we have seen, are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis. The one contemplates the observance of the peace and good order of the city. The other has a more enlarged view,—the maintenance of the peace and dignity of the state."

A case more nearly in point is *State v. Lee*, 29 Minn. 445. The defendant was arrested under a state law for keeping a house of ill-fame. She set up as a defense a prosecution and conviction under a city ordinance of the city of St. Paul for the same offense. The opinion is long and instructive. It holds that an offense against a municipal by-law proceeding from the same act which also constitutes a felony under the state law is not for that reason to be considered the same offense. The two are distinct in their legal character, both as to the nature and quality of the offenses and the jurisdictions offended against. Quoting from the opinion:

"One who is within the limits of the municipal jurisdiction must not only obey the laws of the state, but must adjust his conduct to the requirements of local by-laws. An act which, outside a city, would subject him to punishment by the state only, committed inside its limits, by reason of the place and the consequent aggravation attending it, will render him liable also for the additional penalty. The same act prohibited by both the city and the state may thus constitute two offenses, which are intrinsically and legally distinguishable."

The case of *Wong v. Astoria*, 13 Oreg. 538, is this case on all-fours, as to the points involved for decision. The prose-

cution was for keeping a bawdy-house. The validity of the city ordinance was contested, and the further point was made that the police court did not allow a jury trial. The court said:

"The appellant's counsel claims that a trial by jury is secured to a party by the constitution of the state. This is undoubtedly so as to all criminal prosecutions, but the enforcement of a penalty for violating a city ordinance is not a criminal prosecution, within the meaning of the provision of the constitution upon that subject. The right of trial by jury provided for in the constitution of the United States and of various states is understood to mean the common-law trial by jury. If the appellant had been allowed a jury trial under the charter of the city, it would not have been a compliance with the constitutional provisions. It must have been by a jury of twelve good and lawful men, to have fulfilled its terms. Nor is it the deprivation of the right of a jury trial proper, because the party is not able to obtain it in the inferior court. If it can be secured upon appeal by a reasonably simple procedure, the conditions of the guaranty will be answered. . . . The procedure was to administer the regulations of the city, and the constitution of the state authorizes the creation of municipal courts for that purpose. It was in no sense a trial for a crime against the state."

In *Mankato v. Arnold*, 36 Minn. 62, it is said:

"Offenses against ordinances enacted by a municipal corporation, in the exercise of its legitimate police authority, . . . are not generally construed to be criminal cases, in the proper sense of the term 'criminal,' and the prosecutions therefore are not criminal prosecutions, within the meaning of the constitution, which refers to prosecutions for offenses essentially criminal under the general laws of the state. . . . Prosecutions for offenses against municipal by-laws, which in cities, from the number and nature of such cases, must necessarily be summary to be effective, are on the same footing with prosecutions for petty offenses, which in some jurisdictions are summarily tried, and a jury held not to be required, even though the penalty be a limited imprisonment."

Again, in *State v. Robitshek*, 60 Minn. 123, the court said:

"It has repeatedly been decided by this court, as it has elsewhere, that municipal ordinances are not criminal statutes; that violations thereof are not crimes, nor are such violations governed by the rules of the criminal law, save in certain specified exceptional particulars."

A most interesting discussion of the question here involved may be found in the case of *McInerney v. Denver*, 17 Colo. 302. It is said:

"An ordinance must be authorized and must not be repugnant to a statute in force over the same territorial area; but, if there is no other conflict between the provisions of the statute and the ordinance save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question that the same act may constitute two offenses, viz. a crime against the public law of the state, and a petty offense against a petty local municipal regulation. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other. . . . But we are told that admitting that the same act may be an offense against each of two sovereignties or laws, and that the actor may be punished for each of the offenses, it does not follow that the *procedure* may be different. And it is confidently asserted that summary proceedings without a jury in cases like the present cannot be constitutionally sustained."

The court then asserts the rule in that state to be that in prosecutions for the violations of ordinances, where the offensive act is not a misdemeanor by general statute, the constitutional provisions relating to indictments and trials by jury do not apply, and the fact that imprisonment in the first instance may be part of the penalty does not affect the question. It then proceeds to discuss the question of whether a summary proceeding to punish a violation of a municipal by-law, which is also a misdemeanor under a public statute, punishable by indictment and jury trial, is proper. The discussion bears with some considerable directness upon the

question here for decision. It is said the inquiry is not, Was the *act* complained of a public misdemeanor by statute or at the common law? but, Does the *offense* charged belong to a class of offenses that were usually proceeded against summarily? The fact that the legislature saw fit to give the power to cities to enact the ordinance gives rise to the inference that they believed the offense to be, as against the city, one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order and the preservation of public morals in cities, renders summary proceedings in such cases a necessity. The court then says:

"A careful examination of authorities has led us to the conclusion that both in this country and England the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order and otherwise promoting the general welfare within cities and towns had for more than a century prior to the adoption of our constitution been generally prosecuted without a jury;" — citing a large number of authorities.

A case in Maryland has some bearing upon the question under discussion. Under the charter and ordinances the mayor of Hagerstown was given authority to try and fine disorderly persons and lewd women found within the corporate limits. It was insisted that the exercise of this power was the exertion of judicial power, which by the constitution was confided to certain specified classes of persons, and that the mayor was not included in the enumeration. The court said:

"This argument would be entitled to great weight if we thought the power exercised by the defendant was, in the sense of the constitution, a part of the judicial power. But we entertain no such opinion. We regard it as but a part of the *police* power, as contradistinguished from the regular judiciary powers of the state. From time immemorial a distinction has been observed between the two, both in England and this country. It would be next to, if not quite,

impossible for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruption,— indeed, to do most of the thousand things necessary to be done to carry on its various and indispensable operations,— if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictment, and trial. . . . We regard the power conferred on the corporation of Hagerstown to summarily punish persons of the description of the defendant, Elmira, is admitted to have been, as falling directly within the definition of a police regulation. She was punished for an offense against the decency and morals of Hagerstown, and not against those of the state. She offended within the corporate limits, and for such offense she was made to answer. This did not wipe out all responsibility for the offense to the dignity and sovereignty of the state." *Shafer v. Mumma*, 17 Md. 331.

One of the points under discussion may be further illustrated by reference to the decisions of the United States supreme court with reference to counterfeiting. In *Fox v. Ohio*, 5 How. 410, the court held that passing a counterfeit coin, which was punishable under federal law, might also be punished by the state as a crime, and that, although the party might be convicted for violating both statutes, still he would not be twice put in jeopardy for the same offense. This doctrine was held sound in *Moore v. Illinois*, 14 How. 13, and the status of double allegiance was discussed, and liability to both sovereignties upheld. See note to this case, 5 Notes, U. S. Rep. 213.

It is not to be understood, however, that the authorities are uniform in their holdings on these questions. Some of the cases hold that, when the ordinances and state law prescribe a penalty for the same act, a conviction under one is a complete bar to a conviction under the other. *State v. Cowan*, 29 Mo. 330; *State v. Thornton*, 37 Mo. 360; *State v. Welch*, 36 Conn. 215. They deny the principle made prominent in the cases cited, that the same act may constitute two distinct and several offenses, and each be subject to pun-

ishment by the proper tribunals of the state and the municipality. Of course, if the act complained of constitutes but one offense, then it must be punished in the way prescribed by the constitution, and if, under the state law, it is only triable by a jury, it cannot be dealt with summarily when prosecuted under the ordinance. If the rule already quoted from *State ex rel. Milwaukee v. Newman*, 96 Wis. 258, is to be sustained, it must be upon the theory that what may be a felony or misdemeanor under the statute, when dealt with by a city by ordinance or by-law loses its criminal aspect because of its local character and the greater necessity for more stringent police regulation in cities. It cannot be sustained upon any other logical theory. If it is the same offense when prosecuted under the ordinance that it is under the state law, then the constitutional guaranty of a jury trial must be recognized. If, when prosecuted under the ordinance, it is a petty offense, local in character and insignificant as to results, then it comes within that class of cases that have long been dealt with summarily, and a jury trial is not necessary. The point is made here with great earnestness that the offense with which the plaintiff in error stands charged is a misdemeanor, indictable at common law and only triable by jury. We have already referred to this contention. We have endeavored to show that the offense under the ordinance is not the same as the offense under the statute. It is admitted by counsel for plaintiff in error that the same act may be an offense against each of two different sovereignties, and that each may punish, but it is claimed the *procedure* may not be different. Whether or not the procedure may be different must depend upon the conclusion reached as to the *essence* of the offense. In *State ex rel. Hamilton v. Municipal Court*, 89 Wis. 358, this court made use of the following language:

"The sale of intoxicating liquors without a license is an offense against a municipal regulation. But it is more. It

is an offense against the general law of the state as well. It is a misdemeanor (sec. 1550, R. S.), and indictable (*Allen v. State*, 5 Wis. 329). The prosecution of such an offense, even under a municipal ordinance, is a (*quasi*) criminal prosecution (*Boscobel v. Bugbee*, 41 Wis. 59; *Platteville v. McKernan*, 54 Wis. 487; *State v. Grove*, 77 Wis. 448), and is not a summary proceeding; while actions for such violation of municipal ordinances as are not also misdemeanors are civil actions (*Platteville v. Bell*, 43 Wis. 488; *Oshkosh v. Schwartz*, 55 Wis. 483), and are within the summary jurisdiction."

The decision seems to assume that the act of selling intoxicating liquor without a license, contrary to a city ordinance, rose to the grade of a misdemeanor for no other reason than that it was also forbidden by the state law. Why this conclusion should follow is not pointed out. It is, as we have seen, contrary to the great weight of authority, and, followed to its logical result, would so blend the two offenses that a prosecution for one would be a bar to a prosecution for the other. When it is admitted that the same act constitutes an offense both against the city and against the state, and that both may punish, then it follows that each may punish in accordance with the rules of procedure prescribed therefor, unless some constitutional inhibition prevents. When the peace and dignity of the state are being vindicated the constitution says the accused may have a jury trial. When some local municipal by-law has been invaded the constitutional guaranty does not apply. In the language of the supreme court of Colorado in *McInerney v. Denver*, 17 Colo. 302, we say:

"Whatever may be the view concerning the gravity of the offense against a state law, the fact that the legislature authorizes the city to deal with the same subject by ordinance indicates that to the legislative mind the act also properly constitutes one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order as well as careful sanitary regulations in cities and towns, renders summary proceedings in many

cases a necessity. And we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable requisite."

The statute (sec. 2517, S. & B. Ann. Stats.) empowers the municipal judge of Dane county to deal with this class of offenders in the manner he did with the plaintiff in error. There is a most respectable line of decisions holding that, even if the law providing for summary proceedings without a jury is invalid, yet if the defendant is entitled on an appeal to a trial by jury, and there be no unreasonable limitation connected with the appeal, the constitutional provisions are satisfied. *Steuart v. Baltimore*, 7 Md. 501; *Jones v. Robbins*, 8 Gray, 329; *Emporia v. Volmer*, 12 Kan. 622; *Beers v. Beers*, 4 Conn. 535; *State v. Beneke*, 9 Iowa, 203; *Haines v. Levin*, 51 Pa. St. 412; *Norriston T. P. Co. v. Burket*, 26 Ind. 53; 1 Dillon, Mun. Corp. (4th ed.), § 439. This court made a similar holding in a civil case at an early day. *Gaston v. Babcock*, 6 Wis. 503. The doctrine of the state courts was somewhat modified by the United States supreme court in *Callan v. Wilson*, 127 U. S. 540,—a case involving an offense against a federal statute. See *Natal v. Louisiana*, 139 U. S. 621; *Capital T. Co. v. Hof*, 174 U. S. 1.

We hold that this prosecution is for an offense against a mere police regulation for the good order of the city, for the collection of a penalty prescribed by the ordinance, and that the plaintiff in error was not entitled to a jury trial as a matter of right.

By the Court.—The judgment is affirmed.

THE STATE EX REL. KELLOGG, Appellant, vs. CURRENS and others, The Wisconsin Board of Medical Examiners, Respondents. 111 114 114 114 431 *533 1548 *549

September 9 — October 15, 1901.

Constitutional law: Police power: Infringement of individual liberty: Right to practice medicine: Reasonableness of classification: Who may question constitutionality of law.

1. Some classes of citizens may by law enjoy greater privileges than others or be subjected to different burdens or restrictions, provided the classification be not arbitrary and for the purpose of discrimination only, but be made upon grounds and in recognition of conditions or characteristics which are germane to a legitimate object of police regulation. Thus, in the exercise of the police power, the legislature may by law exclude unfit and incompetent persons from the practice of medicine in this state.
2. The sufficiency of the reasons for a classification of persons in respect to privileges or restrictions is for the legislature, not for the courts; and only in a case clear beyond a reasonable doubt will the courts declare a statute invalid on the ground that its purpose or the classifications it makes are without reason to support them.
3. Ch. 306, Laws of 1901, requires all persons commencing the practice of medicine or surgery in this state to submit to an examination by the board of medical examiners, and to present a diploma from a reputable medical college which requires certain specified courses before graduation, and to pay certain fees for the examination and certificate, but provides that any student who, at the date of the enactment, was matriculated in any medical college of this state which requires certain courses of study, shall, on presentation of his diploma from such college and payment of the fees, be admitted to practice without further examination. *Held*, that the act is not in violation of sec. 2, art. IV, Const. of U. S. (which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states), nor of the XIVth amendment, Const. of U. S. (which prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and provides that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"), nor of sec. 1, art. I,

Const. of Wis. (which declares that "all men are born equally free and independent, and have certain inherent rights; among which are life, liberty and the pursuit of happiness").

4. Where a relator is seeking to compel the issuance to him of a license to practice medicine under a law of this state, he cannot be heard to assail the validity of a provision of that law on the ground that it is unconstitutional.

5. Statutes will not be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The appeal is from a judgment quashing the relation and alternative writ of *mandamus*. The relation set forth that the relator was a citizen of Wisconsin, and graduate of and holding diploma from the College of Physicians and Surgeons, a reputable and regularly incorporated medical college located at Chicago, in the state of Illinois, requiring, as prerequisite of graduation, four courses of not less than six months each, no two to be taken within twelve months; that relator matriculated in 1897, and took one course of six months at the Milwaukee Medical College, a reputable medical college of the state of Wisconsin, having the same requirements; that on June 5, 1901, relator presented to the respondent board application for license to practice, accompanied with the fee of five dollars, such application showing the foregoing and other necessary facts under the statute; that the board received, accepted, and retained said application and fee, received and examined his diploma, and refused to grant the license, except upon the condition, alleged to be unlawful and wrongful, that the relator first pay to the treasurer of said board the further sum of ten dollars and pass an examination by said board, justifying their action under ch. 306, Laws of 1901, which the relation alleges is unconstitutional and void. An alternative writ of *mandamus* was issued upon this application, commanding the Wisconsin board of medical examiners to grant re-

lator a license to practice medicine and surgery in the state of Wisconsin, or show cause.

For the appellant there was a brief by *A. F. Kellogg* and *Fowler & McNamara*, and oral argument by *C. A. Fowler*.

For the respondents there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

DODGE, J. Under the pre-existing statute (sec. 1435*b*, Stats. 1898), relator would have been entitled to a license to commence practice either upon production of such diploma as he now holds, or upon passing examination. By the amendment of 1901 (ch. 306), *both* diploma and examination were made prerequisite to license to beginners, with proviso that "any student who is now matriculated in any medical college of this state which requires [specified courses of study], shall, on presentation of his diploma from such medical college and on payment of the fees specified in this act, be admitted to practice without further examination." "The fee for such examination shall be fixed by the board, but shall not exceed ten dollars, and five dollars additional for the certificate if issued." Other provisions of the act of 1901 may be passed for the present. The appellant contends that the amending act is void because violative of sec. 2, art. IV, of the constitution of the United States, of the fourteenth amendment to that constitution, and of sec. 1, art. I, of the constitution of Wisconsin.

It needs but a glance at the statute in question to satisfy the reader that it does not infringe either sec. 2 of article IV of the federal constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, nor that part of the fourteenth amendment which prohibits any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is obvious

that no discrimination is made for or against any person by reason of citizenship. Exactly the same rights to license are conferred upon the citizens of other states as are conferred upon the citizens of Wisconsin. The classification of the persons who may and those who may not be admitted to practice medicine is upon lines entirely independent of citizenship. True, some people are excluded from the privilege of practicing medicine in Wisconsin, but it cannot be said that thereby is any one abridged of privileges or immunities belonging to him as a citizen of the United States. Those privileges and immunities do not include the right to practice medicine, any more than the right to practice law, within one of the several states. *Bradwell v. State*, 16 Wall. 130, 139; *In re Lockwood*, 154 U. S. 116; Cooley, Torts (2d ed.), 341; *People v. Hasbrouck*, 11 Utah, 291, 303; *Harding v. People*, 10 Colo. 387, 391.

The more strenuous contention, however, rests upon the other portion of the fourteenth amendment, to the effect that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This clause is of the broadest and most sweeping, and has served to warrant the supreme court of the United States in reviewing and considering more state legislation than has almost any other provision of the federal constitution. It is not conceived, however, that this enactment by the nation placed any new limitations upon the legislature of this state, for, in the light of several decisions of this court, the very first paragraph of our declaration of rights has been held a substantially equivalent limitation. That clause but phrases the spirit of the Declaration of Independence, and declares: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the

consent of the governed." This has been held to so declare the spirit of our state constitution that legislative enactments violative of its general principle must be declared void, as beyond the powers vested in its legislature. *Durkee v. Janesville*, 28 Wis. 464, 468; *Hincks v. Milwaukee*, 46 Wis. 559, 566; *Janesville v. Carpenter*, 77 Wis. 288, 302; *Anderton v. Milwaukee*, 82 Wis. 279. It is thus apparent that long before the enactment of the fourteenth amendment, as well as since that time, our legislature was bound to accord to all persons within its jurisdiction the equal protection of the laws, and to refrain from legislation which deprived any of them of life, liberty, or the pursuit of happiness.

These limitations, however, according to all the authorities, state and federal, are to be read as not extending so far as to deprive the states of their power to so control the conduct of individuals as to protect the welfare of the community,—a power commonly described as the "police power." From the earliest days classification has been made by legislatures whereby some people have rights or suffer burdens which others do not,—the criminal may be deprived of his liberty, while the innocent man is free; the minor may be deprived of suffrage, while the adult is privileged to vote; the imbecile or the infant may be deprived of control over his property, while others are not; the owner of real estate in crowded cities may be subjected to burdens and restrictions not imposed upon his rural fellow citizen. These are but illustrations of the application of what is known as the "police power," whereby, strictly speaking, the laws affect different individuals differently, and whereby, in some measure, certain individuals are incidentally deprived of liberty or property, and are restrained in the pursuit of happiness. Hence courts have struggled well-nigh since the commencement of our government to define the line of demarkation between what is permitted and what is forbidden to the legislature by the constitutional restrictions

above referred to, and it has been decided with substantial unanimity that upon those subjects wherein the welfare of the community at large is jeopardized by unrestrained freedom of will and action in every individual the legislature may impose restraints, and that such restraining laws are within the constitutional requirement of uniformity and equality between individuals if they affect all individuals who are situated and conditioned alike with reference to the subject under consideration; that, from the nature of things, class legislation, strictly speaking, must exist; that some classes of our citizens may safely enjoy greater privileges, and other classes may be placed under different burdens and restrictions, as in the illustrations above recited. But equal concurrence is found in the judicial holdings to the effect that such classifications must not be arbitrary and for the purpose of discrimination only, but must be made upon grounds and in recognition of conditions or characteristics which are germane to a legitimate object of police legislation; that, while it is permissible to classify people with reference to the right of suffrage by age or by education, it is not permitted to exclude from that right some classes of individuals who are not distinguished from others by characteristics in some way affecting their ability to safely exercise suffrage; that, while the people may be classified upon the line of mental competency in permitting or restricting them as to their control over their property, it is not permitted to the legislature to classify them upon arbitrary lines of complexion or other discriminating circumstances not affecting their ability in that direction. *Ex parte Garland*, 4 Wall. 333; *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Dent v. West Virginia*, 129 U. S. 114; *Crowley v. Christensen*, 137 U. S. 86, 89; *Baker v. State*, 54 Wis. 368; *State v. Heinemann*, 80 Wis. 253; *State ex rel. Garrabad v. Dering*, 84 Wis. 585; *Bittenhaus v. Johnston*, 92 Wis. 588, 595; *State ex rel. Adams v. Burdge*, 95 Wis. 390; *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172.

It is not necessary to carry the discussion of these general and elementary subjects further. The lines have been drawn and the landmarks pointed out in a multitude of decisions, a few of which are cited above. Among the decisions are very many recognizing that in the exercise of some of the learned professions — notably the practice of the law and the practice of medicine — the peril to the community at large from the presence of unfit and incompetent practitioners fully justifies restriction by the legislature, under its police power, to exclude the latter. This has already been recognized in Wisconsin, and we need not devote space to the reasons therefor. *People v. Hasbrouck*, 11 Utah, 291; *Dent v. West Virginia*, 129 U. S. 114; *State v. Dent*, 25 W. Va. 1; *Ex parte Spinney*, 10 Nev. 323; *Hewitt v. Charier*, 16 Pick. 353; *State v. Vandersluis*, 42 Minn. 129; *People v. Phippin*, 70 Mich. 6; *State v. Heinemann*, 80 Wis. 253; *State ex rel. Walker v. Green*, 112 Ind. 462. From these decisions there can be no doubt that it is within the proper power of the legislature to provide that some people may and some may not practice medicine, provided that the characteristics and conditions distinguishing the former class from the latter are of a kind tending to make their exercise of that profession more beneficial or less perilous to the community than the class excluded.

In the light of these general conclusions, we turn to a consideration of the statute before us, and appellant's assault thereon. The *gravamen* of his complaint is that he is refused a license to practice medicine in Wisconsin except upon the condition of passing an examination before a medical board created therefor, and paying a fee which we must consider as but compensation for the service of holding that examination. *State v. Heinemann*, 80 Wis. 253; *People v. Hasbrouck*, 11 Utah, 291; *State v. Forcier*, 65 N. H. 42. In this restriction upon his freedom to practice medicine there is certainly no improper invasion of individual rights.

The requirement that one establish his educational qualifications by submitting to an examination is one which pertains directly to one of the characteristics which should distinguish those permitted to practice medicine from those not permitted. It cannot be doubted that, as a class, those who are able to and have successfully passed a given examination upon technical subjects are better educated upon those subjects than the class of people who have not passed such examination. But relator complains that he is denied the equal protection of the laws, and is deprived of his liberty unequally, because others who have not passed such examination are by the same law to be admitted to practice. This complaint is of force, unless those so permitted to practice without an examination are distinguished as a class from the class to which relator belongs by some condition or characteristic which at least may, in the sound and honest opinion of the legislature, tend to mark them as having superior qualifications to safely practice medicine in this state. This brings us to a consideration of how those who may enter upon the profession without examination are distinguished from the class to which relator belongs, members of which are required to be examined.

The statutory exception from examination quoted in the statement of facts makes a class of those who at the date of enactment were matriculated in any medical college of this state having a specified course, and who should thereafter obtain and present its diploma; in other words, of those who should obtain the education afforded by the then existing medical colleges in this state of a specified standard. Are there any respects in which this class may by reasonable men be thought to differ from the class of graduates of medical colleges outside of this state, with reference to their fitness to commence practice here? The reasons for a given statute are for the legislature, if there are any which can

fairly have weight. They are not for the courts. The latter have no control over the validity of a law unless they can say with substantial certainty that no argument or consideration of public policy exists which could have weight with any reasonable and honest man. If any such argument or reason can be suggested, its weight or sufficiency is not debatable in the courts. The existence of legitimate and adequate reasons for any law should not lightly be denied. Human minds differ, and what may seem inadequate or irrelevant to one may seem cogent to another. One is not justified, therefore, in assuming that all who differ from him are unreasonable or are not acting in good faith. It is from such considerations as these that the courts have laid down for themselves the rule that only in a clear case — clear beyond reasonable doubt — will they venture to assert that a law is without reason to support either its purpose or the classifications it may make. *Dickson v. State*, 1 Wis. 122, 126; *State ex rel. Grundt v. Abert*, 32 Wis. 403; *Northwestern Nat. Bank v. Superior*, 103 Wis. 43, 45; *State v. Vandersluis*, 42 Minn. 131; *People v. Phippin*, 70 Mich. 25; *State v. Dent*, 25 W. Va. 21; *Ex parte Spinney*, 10 Nev. 323. May not the legislature of 1901, upon evidence or investigation, have been convinced that the then existing colleges of this state could be trusted to give education to their graduates to make them safe practitioners, while they could not be so satisfied as to all colleges outside this state? The character of the men conducting the former class, the opportunity and right of the legislature to control and to prevent deterioration, the special applicability of the instruction to the diseases or phases of diseases characteristic of Wisconsin,— might not considerations such as these have weight with honest and reasonable minds, and lead them to deem safer the graduates of such institutions, as a class, than those of all other colleges, as to the great majority of which the legislature could neither gain knowledge nor exercise any control? It is no

sufficient argument against this or any classification that it either may or does exclude individuals as well or better qualified than some which it includes; that notoriously some medical colleges outside of Wisconsin furnish as good education as any within it. No classification is perfect. No general line can be drawn that will not present glaring cases of inequality or inconsistency. Many a man who just fails of passing an examination is better qualified than many who succeed. Many a man of twenty is better qualified for suffrage than some on whom the law confers it. Such instances, however, do not deprive the legislature of the power to draw a line of classification at the age of twenty-one, nor can those now urged upon us of themselves make classification according to a state line unconstitutional. *Ex parte Spinney*, 10 Nev. 327.

Numerous instances of legislation recognizing confidence in state institutions as a ground of classification are familiar. Very many states (Wisconsin included) recognize the diploma of one or more law schools within the state as making a legitimate class for exemption from examination, and have done so since their early history. As early as 1818 Massachusetts recognized the diploma of Harvard Medical School, or the approval of the State Medical Society, as a proper ground of classification for practice of medicine, and was upheld in so doing by the supreme court of that state, speaking by SHAW, C. J. *Hewitt v. Charier*, 16 Pick. 353. See, also, *Wright v. Lanckton*, 19 Pick. 288. Maine recognized approval of the Maine Medical Association as a ground of classification, and the law has been sustained by the courts, though without debate on the question now in hand. *Bibber v. Simpson*, 59 Me. 181. Alabama admits on the faith of a certificate from the Medical Association of the State of Alabama, also on diploma of any medical college in the United States, and the constitutionality of the law has been declared. *Brooks v. State*, 88 Ala.

122. Indiana distinguishes applicants approved by the State Dental Association. *Wilkins v. State*, 113 Ind. 514. Several states make the fact of practicing therein at the date of the law a sufficient reason for exemption from examination. *State v. Creditor*, 44 Kan. 565. Maryland finds a legitimate distinction between graduates of a "university or college authorized to grant diplomas in dental surgery" and those of "a regular college of dentistry." *State v. Knowles*, 90 Md. 646, 656.

Numerous other illustrations might be found of distinctions for which the reasons would seem extremely doubtful and remote, but as to which the courts have felt unauthorized to deny that the legislature might have found some which satisfied its judgment. We are unable to say that the legislature of 1901 could have had no reason which it deemed cogent and relevant to the protection of the public in requiring graduates of medical colleges outside this state to be examined, while it excepted from that requirement graduates of Wisconsin colleges who were matriculated at the time of legislation. Being so unable so to say, we must recognize this act as within the power of the legislature in a well-recognized field of police regulation, and not denying to any similarly circumstanced and conditioned privileges or protection accorded to others.

Relator points out one other respect in which he contends he and the class to which he belongs are unreasonably discriminated against, namely, a provision of our statute that any practitioner of medicine holding a certificate from any other state board imposing requirements equal to those established by the board provided for therein may, on presentation of same with a diploma, be admitted to practice in this state without an examination, at the discretion of the board, on payment of the fee. Without stopping now to consider whether the legislature might not have considered the fact of the approval of such applicants by the state board

of another state sufficient evidence of their qualification, it is sufficient to say that this provision is not a part of the new enactment of 1901, but was a part of the former section (sec. 1435*b*, Stats. 1898), under which relator is claiming the right to compel the state board to issue to him a certificate. His only right to a certificate depends upon the validity, therefore, of a statute containing this provision, and he cannot be heard to assail its validity. *Hart v. Folsom* (N. H.), 47 Atl. Rep. 603. Were he being prosecuted for practicing medicine without a certificate, he would be in a different situation.

Some ten other grounds of attack upon the statute are assigned and argued, but none of them, even if well assigned, affects the relator. His only legitimate ground of complaint is that he is required to submit to examination, and he is not affected by the fact that others, who are also required to submit to examination, are not required to present the same educational qualifications as he has presented. Except as to the two classes above discussed, all other persons seeking to commence the practice of medicine in the state of Wisconsin are subject to the requirement now made of the relator,—that they submit to an examination before the state board. Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. The fact, if it were a fact, that less educational requirements are demanded from osteopaths as preliminary to an examination by the board, in no wise affects the relator, whose qualifications for admission are, as he alleges in his relation, all conceded, except the passing of the examination. The question whether the requirement of a diploma is an unconstitutional one, as discriminating against those who by some other method of study have acquired equal education, is not open to the relator, who confessedly has his diploma. We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely

assumes to champion the wrongs of others. We therefore refrain at the present time from the examination of the details of these various parts of this complicated statute.

By the Court.— Judgment affirmed.

WISKIE, Appellant, vs. THE MONTELLO GRANITE COMPANY, Respondent.

September 9 — October 15, 1901.

Master and servant: Fellow-servants: Negligence.

1. Whether or not employees of the same master are fellow-servants, so that the master is not responsible for an injury to one caused by the negligence of another, does not depend upon the grade or rank of the servants but upon the nature of the service being performed by them in which the negligence occurs.
2. A foreman who personally conducts the blasting in a quarry is a fellow-servant of those who assist him in such work, and one of the latter cannot recover for injuries caused by the unexpected explosion, beneath the rock upon which he was at work, of powder which the foreman had negligently permitted to remain there after the partial explosion of a blast. *McMahon v. Ida M. Co.* 95 Wis. 308, distinguished.

APPEAL from a judgment of the circuit court for Marquette county: LAWRENCE W. HALSEY, Judge. *Affirmed.*

This is an action to recover damages for personal injuries sustained by the plaintiff December 17, 1900, while in the employ of the defendant in its granite quarry, by reason of the unexpected explosion of a powder blast beneath a rock on which he was at work at the time. Issue being joined and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The plaintiff testified to the following effect: He was thirty-six years of age. He had worked for the defendant

three years, most of the time drilling holes in the rock with steam or air drills. He was so at work Friday, December 14, 1900, when Pender, the defendant's foreman, told him to bar some stone loose, and put chains on them, and get them ready for the derrick. Two other workmen (C. and G.) were working on another stone glutting it,— raising it up from the bottom, and driving it off from the main body of the rock. Gluts are made of iron or steel, and of different sizes,— from one to two inches in diameter; and they run to a point,— wedge shaped. To glut stone out, the men drill the stone out and crack it. Then Pender had C. and G. put gluts in and glut it out; one to glut from the top, and the other from the bottom. They had glutted from the bottom, and raised the stone an inch and a half. The stone was eight or nine feet long, five or six feet across, and six or seven feet thick. The seam was eight or nine feet long, six or seven feet deep, and half an inch wide. Late in the afternoon of Friday, Pender stopped C. and G. from glutting, and told them that they could not get the stone out in that way; that he would get it out for them. Pender went after the powder, and sent plaintiff for a lump of clay. When they returned, Pender went to pouring the powder from a tin can, holding about a pint, into the seam or crack, and continued until he had emptied four cans into it, and then told plaintiff to get the kerosene, that the powder was running away. Plaintiff got the kerosene, and Pender took the can and poured it into the crack. He then poured another can of powder into the crack, and some more kerosene, and followed it by two more cans of powder. Then it filled clear to the top with powder, and Pender then put in his fuse, and sent plaintiff for dirt. Plaintiff brought a shovel of moist sand, and Pender put it on the top of the powder. Pender then packed the dirt with his hands all along the top of the crack, and told C. and G. to get some wood to put on top, and told plaintiff to take the tools away from

the front of the blast. After those things were done as so directed, Pender ordered the men out of the hole, and then Pender gave the signal to blow the horn, to let people know there was going to be a blast. The crack into which the powder was so put extended from the top to the bottom of the rock, and was one half inch wide clear down to the bottom. When the signal was so given, C. and G. and Pender and plaintiff came down to the corner twelve or thirteen rods away from the blast. When the blast exploded, plaintiff was looking down the street, paying no attention, and did not hear the report. Pender first called out "All over!" which meant that the blast had gone off. When they returned to the hole, Pender told plaintiff to bar and chain stone again, and told C. and G. that they would "have to cut that stone again," and with his chalk and line Pender marked where they were to cut the stone. The two ends of the stone were free, and the side against the rock was separated from it about half an inch. That was the width of the crack. C. and G. drilled across the stone from the seam to the front of the stone, and while they were doing that plaintiff continued getting out stone with a crowbar, and chaining them, until the bell rang and they all quit for the night. The next morning (Saturday) Pender said, "We won't work to-day; it looks like a bad day;" and so plaintiff went home, and did not return until Monday morning, December 17, 1900. Pender then said that C. was not coming out that morning, and that plaintiff should help drill that line which Pender had marked on Friday. Plaintiff then went to work on that line and on the stone they had been glutting out. The holes were drilled about two inches deep, and three or four inches apart. The wedges were put in and the stone broken by G. The stone was drilled from the free end. The piece drilled off was four feet long. After the stone was broken, Pender told plaintiff to take the strike hammer and go and drive the gluts where C. had

been drilling on Friday. The powder had been poured in right near those gluts,— poured down from the top of the stone. Plaintiff took the strike hammer, and went there to drive on the gluts, while G. was driving on the side. While so driving the explosion went off and made plaintiff totally blind. Plaintiff then heard Pender say, "Oh, God! I supposed that the rain soaked the powder out." When the blast so went off Pender was about four feet away from plaintiff. The explosion was loud. The powder came right from the top where plaintiff was driving the gluts. G. and he were striking at about the same time; he on the top, and G. on the side. After the explosion G. led him away to the doctor's office, and it was about seven weeks before he could see, and during the time he suffered a great deal of pain. He was hired by Pender, and received $1.75 per day. Pender ordered the men about in the quarry. No one else had anything to do ordering the men in the quarry. Pender attended to the placing of the blasts and putting in the powder at all times. Plaintiff never handled the powder, and did not know anything about placing blasts. He did not know anything about there being powder in there when the blast went off the second time. Pender did not do any glutting, and did no glutting on this rock.

On cross-examination the plaintiff testified in effect as follows: He had been employed by the former owners of this same quarry, and had so worked for them eleven or twelve years, and had been working in this quarry altogether for about fourteen years. During that time he had been doing general work, covering everything, except handling powder — blasting. Pender was the foreman under such former owners. They had used seam blasting in the quarry ever since plaintiff first started to work there, and Pender handled the powder during all that time. It was usual for Pender to have somebody get sand, dirt, powder, and oil for him. He would call for it. This rock was

drilled first and cracked. It very often happened that a rock was drilled and cracked, and then a seam blast put in to blow it out. That had been done on rock on which he was drilling. Whatever Pender called for, plaintiff would get. He never knew of an occasion before when a blast failed to move the rock. This was the first time he ever saw that occur. At the time of the explosion Pender was giving orders. Just before, he was doing nothing. Plaintiff's work on Friday was ten or twelve feet from the rock. On Monday he examined the rock to see the position of the gluts, and he was sure they were not put in after the blast on Friday, but were put in before the first blast, and remained there. He saw them after the first blast, but did not examine the seam to see whether it was wider before than after that blast. It seemed to be about half an inch wide, as before. He did not use the steam drill Monday morning because Pender ordered him to use the hand hammer. He had attempted to glut off rocks as large as that before. It looked to him as though the bottom of the rock was flat,—but he could not see under it, and did not look. He had seen Pender pour kerosene oil into a seam blast before, but did not know how many times. He did not know whether it was a usual blast in comparison with blasts he had seen Pender put in before, nor whether the powder was larger or smaller grain. The powder was black fine powder. There was blasting in the quarry two, three, or four times a week; sometimes two, three, or four times a day. He saw smoke at such times, but paid no attention to it. From what he saw and what occurred on Friday, he thought the powder had all exploded, and it did not occur to him that there might be some powder unexploded. He supposed the blast had gone off, from the smoke.

Such is a general outline of the circumstances under which the plaintiff was injured, as detailed by himself. Some of his testimony was corroborated by three other workmen in

the same quarry. There were also two expert witnesses on the part of the plaintiff whose testimony tended to prove that the seam blast, as prepared or charged by Pender on Friday, was improper; that the usual and customary way, and in fact the only proper way, is first to make a base for the powder by pouring sand into the crack or seam so as to confine the powder to certain limits, and then put in the powder, so that the explosion will ignite all the powder; but that, in case the explosion is only partial, then more sand should be poured into the seam, so as to cover up the powder in there and make a new base for the second charge of powder to be exploded, and that it is dangerous to drill or glut the rock until after all the powder which had been put in had been exploded; that the soaking of powder by a common rain will not entirely destroy the explosive effect of powder, as it is glazed over with graphite so as to resist the water, although the water would in time destroy such effect.

For the appellant there was a brief by *Fowler & McNamara*, and oral argument by *C. A. Fowler*.

For the respondent there was a brief by *Turner, Pease & Turner*, and oral argument by *L. S. Pease*.

CASSODAY, C. J. The gist of the complaint is that the defendant negligently failed to furnish to the plaintiff a reasonably safe place in which to work, and to keep and maintain the same in a reasonably safe condition. This is made more plain by the allegations therein to the effect that Pender improperly prepared the blast; that he knew, or ought to have known, that it had not wholly exploded on Friday; that that made it his duty to renew the blast, as stated in the expert testimony; that he negligently failed to do so, and then negligently and carelessly set the plaintiff to work on the rock on Monday to remove and separate the same from the main body by glutting, as indicated in

the testimony. In other words, the negligence complained of is the negligence of Pender, who, with the assistance of the plaintiff, prepared the blast on Friday. Pender and the plaintiff had together worked in that quarry for fourteen years prior to the accident. During that time Pender had had charge of the men, and personally conducted the blasting. In doing so he was assisted by others, including the plaintiff. Such blasting occurred two, three, or four times a week, and sometimes two, three, or four times a day. Never before the occasion in question had a blast failed to fully explode. There is no pretense of any negligence on the part of the defendant, except in what Pender so did and so omitted to do on the occasion in question. The question recurs whether the plaintiff can recover from the defendant by reason of such negligence on the part of Pender.

The defendant contends that there can be no recovery, by reason of the fact that the plaintiff and Pender were co-employees in the work of such blasting. The plaintiff contends that they were not co-employees. All must agree that at common law the master is not responsible for injury to a servant caused wholly by the negligence of a fellow-servant. Courts differ widely, however, as to who constitute such fellow-servants. In this state, and most of the other states, it is firmly settled that it does not depend upon the grade or rank of the servant whose negligence caused the injury, but upon the nature of the service being performed by them and in which the negligence occurs. *Dwyer v. Am. Exp. Co.* 82 Wis. 307, and cases there cited; *Kliegel v. Weisel & V. Mfg. Co.* 84 Wis. 148; *Stutz v. Armour*, 84 Wis. 623; *Hartford v. N. P. R. Co.* 91 Wis. 374, 379; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413; *Dahlke v. Illinois S. Co.* 100 Wis. 431; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574; *Adams v. Snow*, 106 Wis. 152; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 5, 6; *Liermann v. Milwaukee D. D. Co.* 110 Wis. 599. For earlier

cases in this court see *Toner v. C., M. & St. P. R. Co.* 69 Wis. 197, 198. The rule stated is mentioned in a standard work as the "approved doctrine," and the authorities cited from most of the states and the English courts justify the statement. 12 Am. & Eng. Ency. of Law (2d ed.), 933–942. The supreme court of the United States has repeatedly affirmed the rule mentioned, especially during the last few years. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 379–390; *Central R. Co. v. Keegan*, 160 U. S. 259; *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346; *Northern Pacific R. Co. v. Charless*, 162 U. S. 359; *Martin v. A., T. & S. F. R. Co.* 166 U. S. 399; *New England R. Co. v. Conroy*, 175 U. S. 323. See, also, *Stevens v. Chamberlain*, 51 L. R. A. 513, and note. These cases overrule *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, and disapprove the rule in force in Ohio and some other states. In most of the cases cited the foreman or manager of the work was the person guilty of the negligence complained of. Thus the supreme court of the United States has expressly held that:

"A common day laborer in the employ of a railroad company, who, while working for the company, under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, received an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow-servant with such engineer and such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted." *Northern Pacific R. Co. v. Hambly*, 154 U. S. 349, 355, 356.

In that case Mr. Justice BROWN, speaking for the court, states the rule as indicated, and cites cases in support of it from fifteen states, including Wisconsin. He also cites cases holding the contrary doctrine. That case is quite similar in its facts and ruling to *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668, and *Toner v. C., M. & St. P. R. Co.* 69 Wis. 197–199. So in a more recent case the supreme court of the United States has held that:

"Where the business of a mining corporation is under the control of a general manager, and is divided into three departments, of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." *Alaska M. Co. v. Whelan*, 168 U. S. 86.

Counsel cite *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, in support of their contention that the defendant is responsible for the negligence of Pender. But that case has recently been limited to the proper selection and instruction of a sufficient number of competent servants to properly do the work. *Portance v. Lehigh Valley C. Co.* 101 Wis. 579. Counsel insist that this case is ruled by *McMahon v. Ida M. Co.* 95 Wis. 308. In our judgment, that case is clearly distinguishable from the case at bar. In the statement of the case it is said:

"The gist of the complaint is that the plaintiff was set to work by a shift boss in a certain part of the mine where there were concealed unexploded blasts known to the shift boss, but not to the plaintiff; and that plaintiff, in ignorance of the danger, while drilling and preparing for a blast, was injured by the explosion of one of the concealed blasts."

It is further stated, in effect, that the shift boss, Thomas Cadden, testified that July 1, 1894, he loaded six holes in the forehead of a certain drift with dynamite, and endeavored to explode the same by electricity; that there were three holes that had wires sticking out of them after the blast had been fired; that no further work was done at that place in the mine until July 17, 1894, at which time the shift boss placed the plaintiff and one Hugh Cadden at work at the forehead in question. McMahon himself testified that he commenced work in the mine June 19, 1894; that he first worked back towards the shaft from the forehead, the further

end of the diggings,—from the west to the east, between the shaft and the forehead; that he worked at that place near the shaft about two weeks; that after that they moved down about 100 feet away, and worked there probably a week, and July 17th they started to work up in the forehead,—right at the forehead; that there had not been anybody working in that forehead just before for a while,—not for a couple of weeks, he should judge. That was the place where the explosion occurred which injured McMahon. It is very obvious that McMahon was not at work at that place July 1st, when the partial explosion took place, nor at any time until he was put at work there by the shift boss, July 17, 1894; and consequently he was put in a new place to work, which the shift boss knew to be dangerous, but of which he was ignorant. The admitted facts in the case at bar are very different.

We must hold that the plaintiff in this case was a fellow-servant with the foreman, and hence that the defendant is not responsible for the negligence of Pender. Besides, the plaintiff and Pender had worked together in the quarry for fourteen years in the same kind of service, and having the same relation to each other, and hence we must hold that the plaintiff assumed the risk. This view is supported by the authorities cited. See, also, *Paule v. Florence M. Co.* 80 Wis. 350; *Showalter v. Fairbanks, M. & Co.* 88 Wis. 381; *Dougherty v. West Superior I. & S. Co.* 88 Wis. 343; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1.

By the Court.—The judgment of the circuit court is affirmed.

LONERGAN, Plaintiff in error, vs. THE STATE, Defendant in error.

September 10 — October 15, 1901.

Criminal law and practice: Court and jury: Sufficiency of evidence: Alibi.

1. In a criminal prosecution, especially for a capital offense, the accused is entitled to have the sufficiency of the evidence passed upon by the trial judge, and also by the supreme court on writ of error if the question is properly presented by the record.
2. Three persons, while attempting to escape after having made an assault with intent to rob, met a police officer and one or more of them shot him. The overwhelming preponderance of the evidence fixed the time of the shooting at not earlier than 6:35 o'clock. A long freight train passed a depot about a quarter of a mile from the scene of the tragedy at 6:25, and, proceeding without stopping, had passed a tower house half a mile from both places at not later than 6:32. At 6:45, when said train was about two miles distant, a tramp, apparently in a drunken condition, was discovered on top of one of the cars. The evidence identifying him as one of the men who did the shooting was very weak. *Held*, that the possibility of such tramp having been at the scene of the murder when it was committed was in such doubt as to require reversal of a conviction therefor.

ERROR to review a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The plaintiff in error was tried in the circuit court for Fond du Lac county on an information charging him and one Prof. Shorty, *alias* John Morris, with the murder of one William Prinslow, a police officer of the city of Fond du Lac. He was convicted of murder in the first degree, and brings his writ of error to reverse the judgment pronounced on such conviction.

It appeared by the evidence that on the evening of November 18, 1898, at about 6:30 o'clock, or within a few minutes thereafter, an assault was made upon one George Seitz, a liveryman at Fond du Lac, and an attempt made to rob

him, by three unknown persons. The assault took place upon the sidewalk of a street called Forest avenue, in said city, in front of the livery barn belonging to Seitz, which is located on Forest avenue, just west of the east branch of the Fond du Lac river. The attempted robbery failed, and the three men ran across the bridge over the river easterly on Forest avenue, and then turned south past the depot of the Chicago, Milwaukee & St. Paul Railroad, and when they were a little south of First street (the first street south of Forest avenue running east and west) they were met by Officer Prinslow, who was coming from the south, and three shots were fired by one or more of the escaping criminals, inflicting vital injuries upon Prinslow, causing his death. No one saw the three assailants of Seitz so that they could positively identify them. The evening was dark and somewhat stormy. After the shooting of the officer by the men they were not identified again by anybody and were not pursued. The Chicago & Northwestern Railway tracks run north and south through the city of Fond du Lac, the main depot of the company being located a little over two blocks from the place of the assault, and a little south thereof. The Chicago & Northwestern line runs almost due north and south, and the Chicago, Milwaukee & St. Paul line, after leaving its depot, runs southwest, and crosses the Northwestern line, forming a junction at a point about one half mile south of the Northwestern depot, where there is a tower house and a man located in charge thereof. Six hundred or eight hundred feet south of this tower house are the coal sheds of the Northwestern company, and about two and one half miles south from the tower house is a bridge, which carries a wagon road over the Northwestern track at the summit of a grade which commences about at the coal sheds. The plaintiff in error and the other defendant, Prof. Shorty, *alias* John Morris, were seen around town in Fond du Lac on the day of the murder, and had been seen

together during that day in the vicinity of a place called Five Points, four or five blocks south of the place of assault, and a short distance north of the tower house and the coal sheds. Both of the defendants had been drinking during the day, and had been seen somewhat intoxicated, and had been around the coal sheds aforesaid at different times during the day. A long freight train upon the Northwestern tracks passed south that evening. The train was what is known as a double header, and according to the depot records it left the main depot of the Northwestern Railway at 6:25 p. m., passed the tower house and junction aforesaid one half mile south of the main depot at 6:30 p. m., and proceeded south without stopping. When this train had proceeded south to a point about two thirds of the way up the grade between the coal sheds and the bridge aforesaid, a brakeman upon the train discovered the plaintiff in error, *Lonergan*, lying down upon the roof of one of the freight cars near the head of the train, and appearing to be intoxicated, and the brakeman testified that it was about 6:45 p. m. when he made the discovery. Nothing was then known by the brakeman or any of the train employees of the fact of the commission of the murder.

It does not appear when or where the plaintiff in error left the train, but he was arrested January 1, 1899, and taken to Fond du Lac, and bound over for trial. When arrested he stated that he left Fond du Lac at 4:15 p. m. on the day in question. While in jail it was found that he had secreted in his coat, between the lining and the outside thereof, an account of the shooting of Officer Prinslow as it appeared in the Milwaukee Sentinel on the day after the shooting occurred. This article he tore up when it was found. It also appears that an attempt to break jail was made during his confinement, in which the plaintiff in error appears to have assisted in some degree.

The jury acquitted the defendant Morris, but found the

plaintiff in error guilty. A motion was made to set aside the verdict and for a new trial for the reason, among others, that the verdict was against the evidence and that substantial justice had not been done. This motion was denied, and the plaintiff in error was sentenced to imprisonment for life.

For the plaintiff in error there was a brief by *John C. Slater*, attorney, and *Murphy & Kroncke*, of counsel, and oral argument by *Mr. Slater* and *Mr. George Kroncke*.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

WINSLOW, J. In criminal cases, and especially in a prosecution for a capital offense, the defendant has a clear right to have his guilt determined by the court as well as by the jury. "If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial." The accused has the right to have "the solemn opinion of the judge who tried the cause, after a careful hearing of all that may be alleged against its justice, that it ought to stand." *Ohms v. State*, 49 Wis. 415. Not only has he this right to the solemn judgment of the trial judge, but he has also the right upon writ of error, if the question is properly presented by the record, to demand the deliberate opinion and judgment of this court upon the question whether his guilt was sufficiently proven.

Bearing these principles in mind, we have given the evidence very careful consideration, and, after giving to the verdict and the decision of the trial judge all the weight to which they are entitled, we are forced to the conclusion that the guilt of the defendant was not sufficiently proven.

The first serious difficulty is in the matter of the identification of the accused. The assault was committed upon Seitz after dark, upon a stormy evening. No one did or

could distinguish the features of the men who made the assault. They immediately fled, and were seen by other witnesses while running away. No one saw the shooting of Prinslow. One witness, named Rockow, saw the three men who assaulted Seitz a few minutes before the assault, standing on the steps of the Chicago, Milwaukee & St. Paul depot, and saw them again running away after the assault. When confronted with the plaintiff in error upon the trial, he testified that he resembled one of the robbers "quite a lot," and upon cross-examination that he resembled him "quite a little." This testimony is really the only testimony which approaches identification of the defendant as one of the robbers. It is plain that such testimony is quite weak on which to base a conviction of murder.

But this is not the most serious difficulty in the case. The fact is that the testimony shows it to have been almost, if not quite, a physical impossibility for the defendant to have been at the place of the shooting and also to have been upon the freight train where he was found by the brakeman. If not an impossibility, at least the unquestioned facts are such that a most serious doubt is thrown upon the claim that he could have been in both places.

The freight train was on the Chicago & Northwestern Railway going south. It left the city depot at 6:25 p. m. This is shown by the entries in the depot record, made by the clerk whose duty it was to keep the record of the departures of trains. This depot was nearly a quarter of a mile west of the scene of the shooting. This train passed the tower house, which is at the junction of the Chicago & Northwestern and Chicago, Milwaukee & St. Paul Railways, at 6:30 p. m. This is shown by the record kept by the operator at that place in the course of his duty, as well as by the oral testimony of the operator himself. The train did not stop at the tower house, but went right on south. This tower house is nearly half a mile south of

the Chicago & Northwestern depot, and nearly, if not quite, half a mile southwest of the place of the shooting. When this train reached a point not less than one mile, and probably nearly two miles, south of the tower house, the accused was found on top of the train, lying down on the fourth or fifth car from the engine. The train was a heavy one and drawn by two engines. All of these facts are undisputed, and in fact were proven by the state. The testimony of the witnesses produced by the state makes it almost a certainty that the shooting took place after 6:30 p. m. The witness Seitz, who was assaulted, places the time of the assault at about 6:30, and the shooting at a few minutes later. Steinbarth, who was talking with Seitz at the time of the assault, places the time at about 6:30. Rockow, the witness before mentioned, says it was between 6:30 and 6:35 when he saw the men at the depot before the assault, and testified that he looked at his watch at the time. Frank Nolan, a policeman, who first reached the scene of the shooting, heard the shots, and testified that they were fired at about 6:40 o'clock. He was in the police station, less than a block away, when they were fired. The only witness in the whole case who placed the shooting before 6:30 was one Race, sixteen years of age, who testified that he thought it was about 6:20; but it does not appear that he had any means of knowledge, and he admits that he might have said that it was "around 6:30" on the preliminary examination.

When we come to the witnesses of the defense, however, all doubt seems to be removed, if any existed before, upon the question as to whether the shooting took place before or after 6:30 o'clock. The witness Haberkorn, who was the operator in charge of the tower house, testifies that he left the tower at 6:32 o'clock; that he looked at the clock as he left; that the train had then passed south; that he went north about four blocks, and then heard the shots fired. This witness is unimpeached, and apparently disinterested and

reliable. The witness Halpin was a livery man, driving a bus on the night in question. A train was due at the Wisconsin Central station, about four blocks west of the Chicago, Milwaukee & St. Paul station, at 6:30 p. m., and another one at the St. Paul station at 6:50 p. m. He desired to make both trains, and he testifies that he left the Central station after the arrival of the Central train, and drove over to the St. Paul station, and just as he was backing up to the platform he heard the first shot, and about two or three minutes afterwards he heard three other shots, and that it was about 6:45 when he heard the final shots. This witness also seems to be unimpeached and disinterested. Both of these witnesses have data on which to rest their opinions as to time concerning which there can be little room for doubt. It seems to us that the overwhelming preponderance of the evidence fixes the time of the tragedy at a time not earlier than 6:35, and probably very near to 6:45 o'clock. A verdict that it occurred prior to 6:35 would be set aside as against the weight of the evidence.

Here, then, is the dilemma: The shooting took place between 6:35 and 6:45 o'clock. The train upon which the alleged assassin was found about 6:45 o'clock was then probably two miles from the scene of the shooting. It had passed the tower house, about half a mile from the place of the shooting, at 6:30 o'clock, and had not stopped. How is it possible that the accused, in his drunken condition, could have got to that train after the shots were fired? It will not do to say that probably the train was a long one, and that the record of the operator at the tower house means only that the engine had passed, and that the back end of the train may have been half a mile to the rear. The testimony fails to show how long the train was, and the record and testimony of the tower-house operator are that the train passed at 6:30, that he left the house at 6:32, and that the *train* had passed at that time. In the face of this uncon-

tradicted and apparently truthful testimony, which fixes the position of the train on which the accused was found at a place where it would have been impossible for him to reach it after the shooting, we cannot approve a verdict which not only says that it was possible, but that he did so beyond a reasonable doubt.

The accused seems to have been a tramp, not a useful or desirable member of society, and doubtless this fact weighed strongly against him in the trial court; but the law throws the same safeguards around him when accused of crime that it does around the most respected citizen. One of those safeguards is that his guilt must be proven beyond a reasonable doubt. In this case suspicion seems to us to have in large degree taken the place of proof. Other evidence may, perhaps, be adduced upon another trial which will explain or avoid the difficulties which stand in the way of a verdict of guilty upon this record, but we cannot speculate upon the possibility of there being such evidence now. Upon the record as it stands, the jury was not justified in finding the accused guilty.

In the view we have taken of the case, we do not find it necessary to discuss the minor questions raised.

By the Court.— Judgment reversed, and action remanded for a new trial. The warden of the state prison is directed to deliver the plaintiff in error to the sheriff of Fond du Lac county, who is directed to keep the said *Lonergan* in his custody until discharged therefrom, or until otherwise ordered according to law.

INGERSOLL, Respondent, vs. SEATOFT, imp., Appellant. 111 461 117 658

September 24 — October 15, 1901.

Appeal: Exceptions to findings: Record: Mistake.

1. A general exception to a finding containing several propositions of fact, some of which are either undisputed or are clearly supported by the evidence, is insufficient.
2. Where the record shows two general exceptions to the ninth finding of fact and none to the tenth, all of the other findings being excepted to, the supreme court on appeal will not disregard the record and consider one of said exceptions as directed against the tenth finding.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

In December, 1897, there was pending in the circuit court for Winnebago county an action in which *C. D. Ingersoll* was plaintiff and the Ingersoll Land & Lumber Company was defendant. The defendant desired to appeal to this court, and gave an undertaking signed by the defendants in this action to pay the costs on that appeal and any final judgment obtained therein, not exceeding $1,000. Judgment was finally entered in said action in favor of plaintiff, and this action is brought on that undertaking, claiming an indebtedness of $326.65. The defendant *Seatoft* answered, setting up certain matters in abatement and by way of defense. He also set up several matters by way of counterclaim, to which reply was made. The case was tried by the court without a jury, and findings were made for the plaintiff. The defendant filed exceptions to each finding of fact except to the tenth. Such exceptions were to the whole of each finding, and were based on the ground that the same was "contrary to the law, and not supported by the evidence." The tenth finding was not excepted to, but the record shows two exceptions to the ninth finding. Judg-

ment was entered for the plaintiff, from which the defendant *Seatoft* has taken this appeal.

For the appellant there were briefs by *J. C. Kerwin*, and oral argument by *C. D. Cleveland, Jr.*, and *Mr. Kerwin*.

For the respondent there was a brief by *Thompsons, Hollister & Pinkerton*, and oral argument by *J. C. Thompson*.

BARDEEN, J. The appellant seeks to attack the eighth and tenth findings of fact. Both of these findings contain several propositions of fact which are either undisputed or are clearly supported by the evidence. The exceptions, being general, are not sufficient to raise any question except whether the findings support the judgment. *Warner v. Cuckow*, 90 Wis. 291; *Bailey v. Costello*, 94 Wis. 87. What has been said is based upon the supposition that the tenth finding was in fact excepted to. The record shows two exceptions to the ninth finding and none to the tenth. It is argued that this was a clear mistake, and that we ought to consider one of such exceptions directed against the tenth. This we cannot do, except by going contrary to the record made. But, were we to do so, it would avail nothing, for the reason before suggested. Neither are we able to bring the case within the rule laid down in *Reinke v. Wright*, 93 Wis. 368. The findings support the judgment, and it must be affirmed.

By the Court.— Judgment affirmed.

KRECKEBERG and another, Appellants, vs. LESLIE, Respondent.

September 24 — October 15, 1901.

Ejectment: Adverse possession: Evidence: Declarations as to title.

1. In ejectment to recover a strip of land two rods wide, of which the paper title was in plaintiff, defendant claimed that the strip had been adversely used for more than twenty years by the public as a

highway and by himself as a private way, but there was no evidence of any travel over a part of the strip, at least one rod wide, lying on one side of a fence which ran longitudinally through the strip and bounded plaintiff's occupancy. *Held*, that it was error to direct a verdict for defendant.

2. Declarations of one in possession of land, characterizing or defining his possession and claim thereto, are admissible in evidence against those claiming under or in privity with him.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action of ejectment for three small parcels of land. It appeared that plaintiffs were the owners of the W. ½ of the S. E. ¼ of section 28, except a strip in the northwest corner thereof fourteen rods long east and west, by two rods wide north and south. Defendant was the owner of the land north of the plaintiffs', including said fourteen-rod strip. Full paper title was established by the plaintiffs, and the defendant denied claim or possession of one of the parcels, except the west thirty-three feet thereof, and set up claim to the west thirty-three feet of that parcel and the whole of parcel No. 2, on the ground of adverse occupancy as highway, both by himself so as to give a private right of way and by the public so as to establish a public highway. The thirty-three feet so claimed was bounded on the west by the north and south quarter-section line, constituting the west line of plaintiffs' property, and on the north by the south line of said fourteen-rod strip. It extended southerly indefinitely so far as description went, but far enough to include the second parcel sued for and the west thirty-three feet of the first parcel. Evidence was given of such use, as also was evidence given of adverse possession of the third parcel, situated elsewhere, which also was claimed to be north of the east and west quarter line of section 28, and therefore outside of plaintiffs' ownership.

At the close of the evidence the circuit court directed a verdict for the defendant, and overruled a motion to set

aside that verdict and for a new trial as contrary to the evidence, whereupon judgment was entered in favor of the defendant, from which the plaintiffs appeal.

Humphrey Pierce, for the appellants.

For the respondent there was a brief by *A. M. Spencer*, attorney, and *John Bottensek*, of counsel, and oral argument by *Mr. Spencer*.

DODGE, J. 1. The judgment in this case must be reversed for the reason that a portion of the land, of which paper title is conceded to be in plaintiffs, and to which defendant sets up adverse claim in his answer, is not clearly shown to have been used either by the public or by the defendant adversely for any definite period of time, if at all. The defendant claims that all of parcels "one" and "two" lying within thirty-three feet of the north and south quarter-section line has been occupied, used, and traveled adversely to plaintiffs for more than twenty years. His proof shows, or tends to show, travel over a strip of land bounded on the west by a fence approximately two rods west of the quarter line, and on the east by an old rail fence which had constituted the western boundary of the occupation by plaintiff and his grantors for many years. There is no evidence whatever of travel to the eastward of the last-mentioned fence. There is evidence to show that such latter fence was nowhere more than one rod east of the quarter-section line. The plaintiffs say its distance varied from one rod at the north end to eight or ten feet at the south end, and there is other evidence to the same effect. Thus at least one rod of the thirty-three feet claimed by defendant lies to the eastward of such fence, and without the limits of the traveled strip. There is no sufficient proof to overcome or devest plaintiffs' legal paper title thereto, and, defendant's occupation and claim thereof being admitted, plaintiffs should at least have had their right thereto submitted to the jury, and the direction

of verdict was erroneous. This, of course, necessitates reversal of the whole judgment, and remission for a new trial, and renders unnecessary consideration of the sufficiency of the evidence on the last trial to sustain defendant's claims to other portions of the land.

2. Error is assigned upon refusal to permit plaintiffs to show certain declarations made by the defendant's ancestor characterizing his use or occupancy of some of the property in dispute. It is not necessary to decide whether the questions disallowed were proper. They were somewhat vague. It will suffice to point out that declarations of one in possession of land, characterizing or defining his possession and claim thereto, are admissible in evidence against those claiming under or in privity with him. 1 Jones, Ev. § 240 *et seq.*; 2 Jones, Ev. § 355 *et seq.*; *Lamoreux v. Huntley*, 68 Wis. 24, 33.

By the Court.— Judgment reversed, and cause remanded for new trial.

APPLETON MANUFACTURING COMPANY, Respondent, vs. FOX RIVER PAPER COMPANY, Appellant.

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September 24— October 15, 1901.

Ejectment: Counterclaim: Matters of defense.

In an action of ejectment neither the running of the statute of limitations nor facts constituting an estoppel *in pais* can properly be pleaded as a counterclaim, under sec. 3078, Stats. 1898, each being available as a legal defense.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Humphrey Pierce, for the appellant, to the point that the counterclaim should have been sustained, cited *Lombard v. Cowham*, 34 Wis. 486; *Prentiss v. Brewer*, 17 Wis. 638, 643;

Du Pont v. Davis, 35 Wis. 631, 639, 641; *McPherson v. Featherstone*, 37 Wis. 632, 644; *Brown v. Cohn*, 88 Wis. 627, 634; *Weld v. Johnson*, 86 Wis. 552; *Lawe v. Hyde*, 39 Wis. 345, 354, and cases cited; *Moore v. Smead*, 89 Wis. 558, 569; *Dobbs v. Kellogg*, 53 Wis. 448, 451; *Stowell v. Eldred*, 39 Wis. 614, 630; *Dietrich v. Koch*, 35 Wis. 618, 626, and cases cited.

Lyman E. Barnes, for the respondent.

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the counterclaim set out in the answer. The action is ejectment to recover a strip of land twelve feet wide and 406 feet long in the bed of Fox River, upon which is built the spillway and wing dam, as therein specifically described; and the complaint is in the statutory form, and alleges that the plaintiff is the owner in fee of such premises. Sec. 3077, Stats. 1898.

The answer by way of defense alleges, in effect, that the premises are a part of a larger tract of land, described; that on and prior to January 15, 1850, said lands were held and owned by the parties therein named as tenants in common; that one Amos A. Lawrence, therein named, owned the undivided one-half thereof, and that Martin, Conkey, and Bowen, therein named, owned the other undivided one-half thereof; that, on the day and year mentioned, said parties, respectively, made, executed, and delivered, each to the other a deed of partition, therein set forth, which was thereupon recorded; that the water power was appurtenant to that portion of the land set off in severalty to Lawrence, and the same, together with the rights, privileges, and easements, were expressly and by necessary implication granted and conveyed to Lawrence, and, through mesne conveyances, from him to the defendant; that whatever right the plaintiff has to the land described in the complaint is based upon, and derived solely from, conveyances from, by, or through Martin, Conkey, and Bowen, or those claiming

under them, and were taken with full knowledge of the rights of the defendant; that, upon the execution and delivery of such partition deed, the parties thereto gave a practical construction to such deed, which was recognized and acknowledged by the grantors and grantees respectively in said deed; that those claiming under Lawrence successively entered into the open, notorious, actual, adverse, and exclusive possession and occupancy of the lands, rights, privileges, and easements, and especially the right of flowage, granted and conveyed to Lawrence, and built and constructed dams and wing dams in the channel of the river, including that part thereof constituting the *locus in quo*, and that the same and the whole thereof have, for the period of twenty years and upwards immediately preceding the commencement of this action, and still are, maintained, and were and are necessary and essential for the purpose of developing and making available said water power so appurtenant to said land; that, without such dams and wing dams, including that portion of the *locus in quo*, the right of flowage could not be exercised or enjoyed as provided and granted in the deed to Lawrence; that the mills, dams, and water power had, from time to time, been greatly enlarged and improved, at great expense,—all to the actual knowledge of Martin, Conkey, and Bowen and those claiming under them, including the plaintiff; and that the plaintiff's right of action was barred by the twenty-year statute of limitation, and also by the ten-year statute of limitation, founding such claim upon written instruments.

The defendant also answered by way of counterclaim, and alleges, in effect, such partition; that such water power was appurtenant to the land so conveyed to Lawrence; that the defendant succeeds to such rights through mesne conveyances from Lawrence, and that the plaintiff claims solely by mesne conveyances from Martin, Conkey, and Bowen, and their several grantees, who took the same with full

knowledge of the rights of the defendant; that such practical construction was given, and such exclusive possession so taken and such improvements made, as already stated; that the plaintiff's right of action was barred by such twenty-year statute of limitation and such ten-year statute of limitation. The counterclaim also alleges that, during all the time of the building, constructing, maintaining, enlarging, and improving said mills and dams, including the wing dam upon the *locus in quo*, and the expenditure of money therefor, Martin, Conkey, and Bowen and those claiming under them, including the plaintiff, had actual knowledge thereof, and of the adverse claim on the part of Lawrence and those claiming under him, and that by reason thereof Martin, Conkey, and Bowen and those claiming under them, including the plaintiff, are each and all of them estopped from now asserting any right or claim, as against the defendant, to maintain said dams and wing dams, including that portion thereof located on the *locus in quo*.

Such is a general outline of the counterclaim, to which the plaintiff demurred. Obviously, it is nothing more in substance than a repetition of the several things alleged as a defense. No one will seriously contend that the running of the statute of limitation is available as a counterclaim; nor the practical construction of the deed of partition under which Lawrence and those claiming under him had been in the exclusive possession for twenty years and upwards. If such facts are available to the defendant at all, it is by way of defense. If the land in question is included in the express and clear language of the grant to Lawrence, then, of course, it is available as a defense at law. If the terms of the grant are ambiguous and open to construction, and, by practical construction or otherwise, the language is such as to include the land in question, then it is equally a defense at law. If the *locus in quo* is not included in the grant to Lawrence, then the deed to Lawrence is not avail-

able as a defense. The defendant, by its counterclaim, does not seek to reform that deed, nor any other deed in its chain of title, on the ground of mistake or otherwise, so as to include the land in question.

"A counterclaim, when established, must in some way qualify or defeat, in whole or in part, the plaintiff's claim for judgment. *Dietrich v. Koch*, 35 Wis. 626. It must be a claim existing in favor of the defendant and against the plaintiff, between whom a several judgment may be had in the action. Sec. 2656, R. S. 1878." *Moore v. Smead*, 89 Wis. 569.

"Under the statute, the defendant in ejectment is at liberty, by way of counterclaim, to set up any matter as a defense which would, under the old practice, have formed an equitable defense; in which case, the answer must contain a demand for such judgment as he claims. Sec. 3078, R. S. 1878; *Dobbs v. Kellogg*, 53 Wis. 448; *Lombard v. Cowham*, 34 Wis. 486." *Moore v. Smead, supra.*

The counterclaim thus authorized in ejectment is, manifestly, one not available as a defense at law. If it is available at law, the opposite party is not, against his objection, to be driven to a separate trial in equity. In *Lawe v. Hyde*, 39 Wis. 345, it was held that a "defendant in ejectment cannot, generally, set up a counterclaim resting on his legal title, for a release to him of plaintiff's claim of title, which the answer alleges to be void on its face, and without color of right." In a later case it is held that, "in ejectment, facts which constitute a complete legal defense are not the proper subject of a counterclaim." *Brown v. Cohn*, 88 Wis. 627, 633, 634. In that case our late brother PINNEY said:

"It seems to be well established that a counterclaim, based upon the same facts which constitute a complete legal defense, cannot be maintained. . . . A court of law, wherein the right of trial by jury is secured to the parties, is the appropriate tribunal and the proper forum for the trial and determination of questions of title to lands. . . . If the contention of the defendants is maintainable, nearly every action for the recovery of real estate could, by mere form of pleading, be made cognizable in equity, and the plaintiff be thereby deprived of a trial of his action by a jury."

Counsel for the plaintiff concedes that the estoppel *in pais* alleged in the counterclaim is available as a legal defense. This proposition is sustained by the adjudications of this court. *Gove v. White*, 20 Wis. 425; *S. C.* 23 Wis. 282; *Mariner v. M. & St. P. R. Co.* 26 Wis. 84; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328. To the same effect: *Dickerson v. Colgrove*, 100 U. S. 578; *Cleveland v. C., C. & St. L. R. Co.* 93 Fed. Rep. 113, 123; *Kirk v. Hamilton*, 102 U. S. 68, 78; *Ward v. Cochran*, 71 Fed. Rep. 127; *Berry v. Scawall*, 65 Fed. Rep. 742, 753. In this case the facts alleged in the counterclaim as an estoppel *in pais* are also alleged in the answer by way of defense.

By the Court.— The order of the circuit court is affirmed.

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Siegel, Appellant, vs. The Town of Liberty and another, Respondents.

September 24 — October 15, 1901.

Towns: Purchase of road machine: Setting aside illegal contract: Taxpayer's action: Parties: Restraining collection of tax: Pleading.

1. A complaint alleging that plaintiff is a property owner and taxpayer in a road district of the defendant town; that a contract had been made for the purchase of a road machine for his road district together with another district, involving the expenditure of $225, to be raised by taxation of said districts; and that the contract was made without the petition required by law to be filed before the making of such a contract,—states a cause of action to prevent the carrying out by a municipal corporation of an illegal contract involving the increase of taxation or the unlawful expenditure of public funds.
2. Under ch. 83, Laws of 1899 (providing that in certain towns the chairman of the town board may, upon presentation of the prescribed petition, purchase a road machine for a road district or districts, which shall be paid for out of the highway taxes of said districts; that a copy of the contract shall be filed with the town

clerk; and that the amount thereof shall be audited by the town board of audit and paid by direct tax levied by the town board on said district or districts, as other town charges are levied and collected), a contract made by the chairman of the town board for the purchase of a road machine for certain road districts in his town is in legal effect the contract of the town in its corporate capacity.

3. The town and the vendor of the road machine in such case are the only necessary parties defendant to an action to set aside the contract, since the chairman of the town board is not personally bound by the contract, and the road districts are not corporate bodies.

[4. Whether in such a case a complaint which does not allege that the illegal tax has been placed upon the tax roll, or that any attempt has been made to collect it, states a cause of action to enjoin its collection, doubted but not determined.]

5. Where a complaint states a good cause of action it will not be held bad on demurrer, merely because greater relief is demanded than the plaintiff is entitled to.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is a taxpayer's action in equity to set aside an alleged illegal contract made by the defendant town and to enjoin the collection of taxes to meet said contract.

The complaint, after the formal allegation showing the corporate character of the town of *Liberty* and the character of the defendant *The Austin & Western Company* as a foreign corporation, alleged, in substance, that the plaintiff is a taxpayer of road district No. 3 of said town of *Liberty;* that on November 3, 1899, without any petition therefor, the town board of the town of *Liberty* passed a resolution levying an annual tax on the taxable property of road districts Nos. 3 and 7 in said town of *Liberty* to pay the purchase price of a certain road machine; that thereafter one H. B. Dexter, the chairman of said board of supervisors, "claiming to act in pursuance of a written petition signed by the majority of the taxpayers of said road district representing more than one half of the taxable property therein according to the last preceding assessment, made and entered into a written contract with the defendant *The Austin & Western Company,*

Limited, for the purchase of said road machine for the said town of *Liberty* at the sum of $225." Here follows a copy of the said contract, signed by said Dexter as chairman, stating that he had purchased of the *Austin & Western Company, Limited*, one road machine at the sum of $225, which sum said town promises to pay to said *Austin & Western Company*, with six per cent. interest, in annual instalments.

It is then alleged that one William Moroch was at the time of the making of said contract superintendent of road district No. 7 of said town, and that he never in fact signed the said petition for the purchase of said road machine, but that the defendant *The Austin & Western Company, Limited*, corruptly signed the name of said Moroch to said pretended petition, and fraudulently represented to the taxpayers of said district that said Moroch had in fact signed the same; that said pretended petition does not in fact contain the names of a majority of the taxpayers of either of said road districts representing one half of the taxable property therein, but that it has less than a majority of such names and less than one half of the taxable property of said road districts, and was not certified to by the superintendents of either of said districts; that the town clerk of said town has made out and placed in the hands of all the superintendents of road districts in said town warrants for the collection of a portion of the highway tax, which apportionment of taxes for road district No. 3 is based upon the tax so illegally levied by the town board of the defendant town on the 3d day of November, 1899.

The complaint demands judgment annulling said contract, and adjudging said tax to be void, and enjoining the collection thereof.

To this complaint the defendants demurred jointly on the grounds: (1) That the court has no jurisdiction of the defendants; (2) that the plaintiff has no legal capacity to sue; (3) that there is a defect of parties defendant, in that the

chairman and town clerk of the town of *Liberty* are not made parties defendant; (4) that several causes of action are improperly united; and (5) that the complaint does not state facts sufficient to constitute a cause of action as against the defendants, or either of them. The demurrer was sustained on the grounds that the complaint fails to state facts sufficient to constitute a cause of action, and that there is a misjoinder of parties defendant. From an order sustaining the demurrer the plaintiff appeals.

F. C. Weed, for the appellant.

For the respondents there was a brief by *A. M. Spencer*, attorney, and *I. B. Lipson*, of counsel, and oral argument by *Mr. Spencer*.

WINSLOW, J. The cases have been so numerous in this court during recent years sustaining the taxpayer's right in equity to maintain an action to prevent the making or carrying out of illegal and unauthorized contracts by municipal corporations involving the increase of taxation or the unlawful expenditure of public funds, or both, that it seems unnecessary to do more than to refer to the proposition. *Webster v. Douglas Co.* 102 Wis. 181.

The question presented here is whether the complaint, fairly construed, presents such a case. We think it does. The complaint sufficiently shows that the plaintiff is a property owner and taxpayer in a road district of the defendant town; that a contract has been made for the purchase of a road machine for his road district, involving the expenditure of $225, to be raised by taxation of the plaintiff's district together with another district; and that said contract was made without the petition required by law to be filed before the making of such a contract.

But it is said that in making the contract in question the chairman of the town board did not act for the town, but acted simply in a governmental capacity as a public officer

performing a duty laid upon him by law, and hence that under familiar principles the town is in no way liable for his acts and is not a proper party to this litigation. This is the ground upon which the complaint was condemned in the trial court, but we regard it as fallacious.

The act which authorizes the purchase of road machines to be owned and used by road districts is ch. 83, Laws of 1899. This act provides, in substance, that in towns where the road taxes are paid in labor the chairman of the town board may, upon a written petition signed by more than one half of the taxpayers representing more than one half of the taxable property in any road district or districts and by the superintendents of the district or districts, purchase a road machine or scraper on credit or otherwise, to be used and owned by the district or districts petitioning therefor, which shall be paid for out of the highway tax of such district or districts; that a copy of the contract shall be filed with the town clerk; and that the amount thereof shall be audited by the town board of audit, and paid by direct tax levied by the town board on the district or districts, as other town charges are levied and collected.

Under these provisions there can be no doubt but that the contract made by the chairman is, in legal effect, the contract of the town in its corporate capacity, and that the liability incurred is a liability of the town, the funds with which it is to be discharged being obtained, however, by a tax levied upon that portion of the town which is to enjoy the beneficial use of the machine. The contract must have two parties who are bound by it. Evidently the chairman is not personally bound, and the road district is not a corporate body. It seems, therefore, certain that the town in its corporate capacity and the vendor of the machine are the parties to the contract, and, if so, are necessarily the proper parties in an action to set the same aside.

These considerations demonstrate that the defendants are

the proper parties defendant in this action, so far as it aims to set aside the contract.

It seems extremely doubtful, to say the least, whether any cause of action is stated to authorize the enjoining of the collection of the tax, because it is nowhere alleged that the same has been placed upon the tax roll, or that any attempt has been made to collect it. However, as a good cause of action is stated to set aside the illegal contract, the complaint was not subject to demurrer, even though greater relief was demanded than the plaintiff can obtain.

By the Court.— Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

SIEGEL, Appellant, vs. THE TOWN OF LIBERTY and another, Respondents.

September 24— October 15, 1901.

Siegel v. Liberty, ante, p. 470, followed.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

F. C. Weed, for the appellant.

For the respondents there was a brief by *A. M. Spencer*, attorney, and *I. B. Lipson*, of counsel, and oral argument by *Mr. Spencer*.

WINSLOW, J. This is a taxpayer's action in equity to set aside an alleged illegal contract for the purchase of a road machine and to enjoin the collection of taxes to pay therefor. The allegations of the complaint are substantially identical with the allegations of the complaint in the action of *Siegel v. Liberty, ante*, p. 470, the only difference being that the purchase of the road machine in the present action

was made by the town on behalf of road district number 9 in said town, of which the plaintiff, *Matthew Siegel*, is alleged to be a taxpayer, and the fact that it is not alleged in the present complaint that the name of the superintendent of said road district was signed to the petition without authority.

The case is ruled by the decision in the case of *Siegel v. Liberty, supra.*

By the Court.— Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

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SULLIVAN, Appellant, vs. SHERRY and another, Respondents.

September 24— October 15, 1901.

Tenants in common: License by one to trespasser: Parties.

1. If a cotenant or his licensee destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong, whenever such a remedy would exist in the absence of the cotenancy.
2. Where property held in common has been converted by a stranger with the permission of one of the cotenants, the latter is not a necessary party to an action for the conversion.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action for damages for the wrongful cutting and removing of timber from certain lands and the conversion of such timber to the use of the wrongdoer. The complaint stated in substance that, during the fall and winter of 1897–98, Thomas Jennings and the Ingersoll Land & Lumber Company were owners and tenants in common of certain real estate described, during which time defendants, in conjunction with and by license of said lumber company, without the consent of said Jennings, entered upon and cut and car-

ried away from said land pine, basswood, elm, and oak trees, and turned the same into manufactured products, which, while in possession of defendants, were of the value of $1,223.87, and converted said timber and manufactured products to their own use, to the damage of said Jennings in the sum of $611.94; and that, prior to the commencement of this action, his right to recover for said wrong and his undivided interest in the land described were, for a valuable consideration, conveyed to plaintiff.

The defendants demurred to the complaint for defect of parties plaintiff, in that the lumber company should have been joined with the assignee of Jennings, and also because it failed to state facts sufficient to constitute a cause of action. The demurrer was sustained.

For the appellant there was a brief by *Wheeler & Van Doren*, and oral argument by *F. F. Wheeler*. They argued, among other things, that a license from one cotenant is no defense in an action of trespass by the other cotenants. *Tipping v. Robbins*, 64 Wis. 546, 71 Wis. 507; 17 Am. & Eng. Ency. of Law (2d ed.), 674; 18 id. 1136; *Murray v. Haverty*, 70 Ill. 318; *Wilson v. Gamble*, 9 N. H. 74; *Baker v. Whiting*, 3 Sumn. 475; *Clow v. Plummer*, 85 Mich. 550; *Richey v. Brown*, 58 Mich. 435; 1 Addison, Torts (Wood's ed. 1876), §§ 420, 447; 2 id. § 1303.

For the respondents the cause was submitted on the brief of *Nathaniel S. Robinson*. He contended, *inter alia*, that this is an action of trespass *quare clausum fregit*. This form of action will not lie in favor of a tenant in common against his cotenant, or against one acting jointly with such cotenant. *Stoltz v. Kretschmar*, 24 Wis. 283; *Gunsolus v. Lormer*, 54 Wis. 633; *Sayles v. Bemis*, 57 Wis. 316; *Wait v. Richardson*, 33 Vt. 190; *Rawson v. Morse*, 4 Pick. 127; *Hastings v. Hastings*, 110 Mass. 285; 4 Kent, Comm. 370; *Darden v. Cowper*, 7 Jones, Law, 211; *Jacobs v. Seward*, L. R. 4 C. P. 328, L. R. 5 App. Cas. 472; *Von Orman v. Phelps*, 9 Barb. 500; *King v. Phillips*, 1 Lans. 434; *Walling v. Burroughs*, 8 Ired. Eq. 61.

MARSHALL, J. The general rule is that one tenant in common cannot maintain trespass or trover against his cotenant or the latter's licensee of the joint property in respect thereto. The trial court, supposing that such rule was controlling in this case, sustained the demurrer. It is not infrequent that courts are misled into giving a general, the effect of a universal, rule. There are but few of the former that are not subject to exceptions as well established and important as the general principle; and the rule in question does not belong to that few. It is subject to several exceptions, one being that if a cotenant or his licensee destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong wherever such a remedy would exist in the absence of the relationship between cotenants. This court recognized and applied that doctrine at a very early date. *Warren v. Aller*, 1 Pin. 479. It was there said to be well settled by modern decisions in such cases that the action of trover or trespass in favor of the injured party will lie. For further instances where this court has sustained such actions, see *Bulger v. Woods*, 3 Pin. 460; *Earll v. Stumpf*, 56 Wis. 50; *Tipping v. Robbins*, 64 Wis. 546; *S. C.* 71 Wis. 507. The authorities clearly indicate that the exception we have stated to the general rule is not a modern creation. It has been recognized by courts and law writers at least from the time of the Year Books. Co. Litt. 200*a*, 200*b*; 2 Crabb, Real Prop. § 2318*b*; 2 Waterman, Trespass, § 947; 17 Am. & Eng. Ency. of Law (2d ed.), 700; *Symonds v. Harris*, 51 Me. 14; *Clow v. Plummer*, 85 Mich. 550; *Omaha & Grant S. & R. Co. v. Tabor*, 13 Colo. 41; *Critchfield v. Humbert*, 39 Pa. St. 427; *Murray v. Haverty*, 70 Ill. 318. In *Symonds v. Harris* the facts were that one tenant in common of a mill, without consent of his cotenant, removed and appropriated to his exclusive use the mill machinery. The injured cotenant brought trespass *quare clausum*. The general rule was invoked, that one tenant

cannot maintain such an action because in contemplation of law each such tenant is rightfully possessed of every part of the common property, and if one suffers injury by his cotenant obtaining the greater portion of the benefits from such property his remedy is by action for accounting. The court held that appropriation of the income, or mere use, of property was one thing, and appropriation of the corpus thereof another; that the former was a wrong remediable in an action for accounting, but the latter was a wrong sounding in tort, remediable by trespass or trover. The other authorities cited, and many more that might be cited, are to the same effect.

It is clear that the taking of the timber by defendants by permission of the cotenant of Jennings, and appropriation thereof to their exclusive use, indicated a clear determination to hold the same or the proceeds thereof as their sole property, and was such an ouster of Jennings and wrongful conversion of his property as brought them within the exception to the general rule as to remedies between cotenants, rendering them liable in trespass or trover. It also follows, necessarily, that the rule that cotenants must join as plaintiffs in an action for injury to the common property does not apply. Jennings's cotenant was a wrongdoer as well as defendants. All could have been joined or either have been sued separately. The interests of the cotenants were hostile to each other. The general rule for the joinder of cotenants is based on the theory that their interests are in harmony and that each is interested in the recovery. There was no defect of parties plaintiff and no insufficiency in the complaint to state a cause of action.

The order appealed from must be reversed, and the cause remanded with directions to the circuit court to enter an order overruling the demurrer.

By the Court.—So ordered.

HEBBE, Appellant, vs. THE TOWN OF MAPLE CREEK, Respondent.

September 25 — October 15, 1901.

Highways: Defect causing injury: Special verdict: Instructions.

In an action for injuries alleged to have been caused by a large stone lying so near the traveled track as to constitute a defect in the highway, the court directed findings that the injury had been received and as to the amount of damages, and submitted to the jury the question, among others, whether the injury was caused by the defective and unsafe condition of the highway. In the instructions, however, the jury were substantially directed to assume that the stone caused the injury, and to pass upon the question whether, as situated, it constituted a defect, and in so doing to decide whether the track upon which plaintiff was traveling was a part of the traveled way or was so casual that his turning into the same constituted a deviation. The jury merely answered in the negative the question submitted as above stated, leaving all the other questions of the special verdict unanswered. *Held*, that the instructions had so confused the question that it was improbable that the minds of all the jurors had met in the answer, and that therefore the verdict could not stand.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action to recover damages by reason of injuries to plaintiff's wife, team, and vehicle, claimed to have been caused by a defective highway. It was claimed that plaintiff, driving along the traveled way, came in contact with a large stone so near thereto as to constitute a defect, whereby he was thrown from the wagon, the horses caused to run away, and at some distance to come in contact with a telegraph pole, throwing plaintiff's wife out of the vehicle, and causing her injuries, and causing injuries to the team from which one of the horses died. The dispute was principally whether the track upon which plaintiff was driving was fairly a part of the traveled way of the highway or was a

mere deviation therefrom, and whether the plaintiff's own negligence or the unmanageable character of his horses participated in causing the injury. The court submitted a special verdict, of which the first question, to the effect that the injuries in fact occurred, was answered by the court, as also the sixth question, as to the amount of damages. Apart from these, the second question only was answered, and that in the negative. It was, "Was such injury caused by the defective and unsafe condition of the highway at the time and place in question?" That question being answered "No," the jury, under instruction from the court, refrained from answering as to constructive notice of such defect, as to whether the defect was the proximate cause of the injury, and whether plaintiff was guilty of any contributory negligence. After a motion to set aside the verdict and for new trial, judgment was rendered in favor of the defendant, from which the plaintiff appeals.

F. C. Weed, for the appellant.

Humphrey Pierce, for the respondent.

DODGE, J. We are confronted in appellant's brief with twenty-seven assignments of error; not, however, very clearly presenting the fundamental and all-pervading error which we are convinced deprives the verdict of any efficacy and constrains us to hold that there has been an entire mistrial. The only controverted question which was answered by the jury has already been quoted in the statement of facts. Apparently that question assumed the existence of a defect, and called on the jury to decide merely whether or not such defect in fact caused the injuries complained of. That question was wholly unambiguous, and its answer apparently could mean only that the injuries were not caused by the defect complained of, but by something else,— possibly plaintiff's contributory negligence, or possibly some other defect in the highway, such as the telegraph pole.

But when we turn to the instructions we find the jury substantially directed to assume that contact with the stone near the wagon tracks did cause the injury, and to pass upon the question whether such stone, as situated, constituted a defect; and in so doing to pass upon and decide whether the wagon track adopted by plaintiff was a part of the traveled way, or was so casual that his turning into the same constituted a deviation out of the road. Thus, after describing the essentials of a proper highway, the court said: "All these things you are to take into account in determining this question, and you are to find whether or not, under these rules, that highway was in a reasonably safe and proper condition for travel. If you find that it was, then you should answer that question 'No.'" And again: "If you find that it was sufficient traveled track to justify the plaintiff or anybody else in using it, and that that stone was in such proximity to it as to be dangerous, constituting an obstruction dangerous upon that track, then you should answer this question 'Yes.' If, however, you find that the town had prepared a sufficiently wide space for travel, and that this obstruction was merely in a temporary track, and one which the traveling public had no right to assume was a proper track, then that stone did not constitute a defect, and you should answer this question by 'No.'" This presents a situation from which only confusion in the minds of the jury could result. The jury took with them to their room the special verdict, plain, unambiguous, and calling for their conclusion on one question. They also took with them more or less of memory of the court's instruction directing them to arbitrarily answer the question *yes* or *no*, according as they were convinced as to a wholly different subject. Now, while a finding either that there was no defect, or that the defect, if there was any, did not cause the injury, would justify a judgment for the defendant, we cannot persuade ourselves that there is any certainty — nay, hardly

probability — that *all* of the jury have answered either of these questions. The situation is too much like that presented by two contradictory instructions, one of which is right and the other wrong. As has been held in this court, it cannot be presumed that the minds of all the jurymen have been guided by one or the other of such instructions, and here it cannot be presumed either that all of the jury have ignored the question put, and answered a different one, in accordance with the instruction of the court, or that all of them have ignored the instruction of the court, and answered the question as written. Some may have pursued the one course, and some the other. There is therefore no finding upon any of the controverted questions of fact, and no support for any judgment. This view renders unnecessary consideration of the many specific errors assigned.

By the Court.— Judgment reversed, and cause remanded for a new trial.

STAEFFLER, Administrator, Appellant, vs. THE MENASHA WOODENWARE COMPANY, Respondent.

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September 25 — October 15, 1901.

Limitation of actions: Personal injuries resulting in death.

Subd. 3, sec. 4224, Stats. 1898 (providing that "an action brought by the personal representatives of a deceased person to recover damages, where the death of such person was caused by the wrongful act, neglect or default of another," must be commenced within two years after the cause of action accrued), applies to an action for injuries to the person of the deceased, which survives under sec. 4253, as well as to an action to recover for the benefit of his surviving relatives under secs. 4255, 4256, Stats. 1898.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

J. C. Kerwin, for the appellant.

For the respondent there was a brief by *Felker, Stewart & McDonald*, and oral argument by *F. C. Stewart.*

CASSODAY, C. J. This action is brought to recover damages for injuries sustained by the plaintiff's intestate, Christ. Schmidt, while in the employ of the defendant as fireman, July 1, 1894, and from which he died five hours afterwards.

It appears from the statement of the case by the plaintiff's attorney, in effect, that the defendant had, a long time previous to the injury in question, constructed a system of pipes and coils for the condensation of exhaust steam and eventually returning it as hot water to a well or condenser near the boilers. This condenser had been in use several months, and was constructed by the defendant's workmen by cutting off about eight feet in length of an old boiler, having on the inside two circular holes about twelve inches in diameter in the lower half thereof, and an elliptical manhole about the same size in the upper half thereof, each of such holes having an opening in the original head of such section of the boiler. The manhole had been closed by a boiler-iron plate when used as a boiler, and also when used as a condenser. The flue holes were filled with plugs or plates of wood made in two halves, of three-inch oak, planed down on both sides and beveled to fit the perimeter of the flue holes, and across the inside of these wooden plates were placed two iron straps or small plates, the length of the diameter of the wooden plate, having four bolts to the outside through the plate, so that both halves could be drawn closer to the edge of the holes by means of a nut through which the bolts passed from the outside. The condenser had been so constructed by the defendant's engineer, and the head had been so put in by a boiler-maker hired for that purpose. The condenser so constructed was set in a little brick building 10x14 feet, in close proximity to the boilers. There were

three inlets through which the water entered the condenser, and there was a six-inch outlet from the condenser to the roof of the room, and thence extending some eighty feet to the river, in which it was immersed to the depth of about twenty-six inches at the time of the injury, and the vent or opening was reduced to four inches. There was also running from the condenser an inch and a half pipe upward and exhausting into the air.

The deceased had been employed by the defendant three years before his death as a "roustabout," doing manual labor of all kinds. After eleven months of such service, he had been made fireman at the large boiler. Nine months afterwards he was made head fireman, and continued as such until the time of his death. His duties were to keep steam and water in the large boiler, and to regulate the water in the condenser, being instructed to keep that half full. The condenser had been so constructed in the presence of the deceased, and had been used several months before the accident. Two months prior to the injury the engineer noticed that the wooden plugs or plates were in bad shape and dangerous, and five weeks before the injury he had notified the superintendent, but never warned the deceased.

About 9 o clock on the evening of July 1, 1894, the deceased, the engineer, and the fireman were standing about thirty feet from the condenser when they heard a hissing noise as if steam was escaping. The deceased at once went into the fire room where the condenser was, and the other two then heard the noise of an explosion,—a dull sound. They thereupon attempted to follow the deceased, but could not for about ten minutes, by reason of the escaping steam and hot water. In the meantime they could not see the deceased, as he had gone out on the other side, and then came around in front where they were. He was terribly scalded, and his only words were "Take me home." He had the best of medical aid, but suffered greatly, and about

three hours afterwards lapsed into unconsciousness, and died about 2 o'clock the next morning, July 2, 1894.

Such proceedings were thereupon had that his widow, Anna, was appointed administratrix of his estate, and qualified as such September 13, 1894. In March, 1895, Anna commenced an action against this defendant, by service of summons, as such administratrix, to recover damages in consequence of such injuries and death. March 28, 1895, the defendant appeared by attorneys, and demanded a copy of the complaint. August 20, 1895, Anna was married to this plaintiff, *C. W. Staeffler*. November 25, 1896, her verified complaint was served in that action. December 28, 1896, Anna died intestate, leaving, her surviving, a child four months old and her husband. February 5, 1897, the defendant herein served an answer in that action. April 9, 1897, the plaintiff herein was appointed administrator of her estate, and qualified, and October 9, 1897, he was also appointed administrator of the estate of the deceased Christ. Schmidt, and qualified as such. October 30, 1897, as administrator of both estates, he sought to have that action revived in his name as administrator of the two estates, and to file a new and supplemental complaint. November 16, 1897, the defendant answered such petition. The order of the court denying such application was affirmed by this court April 12, 1898. *Schmidt v. Menasha W. Co.* 99 Wis. 300. February 24, 1899, this action was commenced. The venue being changed, and issue joined, and trial had, the court at the close of the testimony directed a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff appeals.

The view we have taken of this case renders it unnecessary that we should consider in this opinion the questions elaborately discussed by counsel, as to whether the condenser was reasonably safe and suitable for the purposes for which it was intended, or whether the deceased, Christ.

Schmidt, assumed the risk. This action was not commenced until more than four years after his death. The statute declares that "an action brought by the personal representatives of a deceased person, to recover damages, when the death of such person was caused by the wrongful act, neglect or default of another," must be commenced within two years after the cause of action has accrued. Stats. 1898, secs. 4219, 4224, subd. 3. This action was brought by such "personal representatives" to recover such damages in a case where it is alleged and proved, or sought to be proved, that "the death of such person was caused by the wrongful act, neglect, or default of" the defendant in this action. On the former appeal it was said by this court:

"Moreover, the action must be brought by and in the name of the personal representatives of such deceased person. There is no authority for its maintenance by any other person." *Schmidt v. Menasha W. Co.* 99 Wis. 302.

True, this court has recently held that "under sec. 4253, Stats. 1898, actions for injuries to the person survive, though death ensue from the injury," and that "the right of action for an injury to the person which survives under sec. 4253 is separate and distinct from the loss to surviving relatives recoverable under secs. 4255, 4256." *Brown v. C. & N. W. R. Co.* 102 Wis. 137. But that furnishes no ground for the contention that an action to recover damages for such injuries, in either case, need not be brought within the time prescribed by the statute quoted for bringing such actions. As indicated, this action comes within the express language of the statutes. Stats. 1898, secs. 4219, 4224, subd. 3. We must hold that the action is barred by the statute of limitations.

By the Court.—The judgment of the circuit court is affirmed.

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ROBERTS, County Judge, Respondent, vs. WEADOCK and others, Appellants.

September 25 — October 15, 1901.

Appeal: Bill of exceptions: Discretionary order.

An order refusing leave to amend the answer, being discretionary, will not be reviewed on appeal from the judgment, where the record does not show upon what the court acted in making such order.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Thomas A. E. Weadock, in pro. per.*, and *Ross & Dwyer*, attorneys, and oral argument by *Mr. Weadock.*

For the respondent there was a brief by *Reed & Reed*, and oral argument by *Myron Reed.*

WINSLOW, J. This is an action upon an executor's bond to recover a claim which had been duly allowed against the estate, and which the appellant, as executor, had been ordered by the court to pay. The case was once tried, and the plaintiff nonsuited, but, upon appeal to this court, the judgment was reversed and a new trial ordered. See *Roberts v. Weadock*, 98 Wis. 400, where a sufficient statement of the facts will be found. After the return of the record to the circuit court, the appellant made application, upon affidavits, for leave to amend his answer so as to deny that any demand for payment had been made upon him; but the motion was denied. Thereafter the cause came regularly to trial, and, there being no appearance on the part of the appellant, judgment was rendered against him and his sureties for the amount of the claim as allowed, with interest and costs, from which judgment the defendants appeal.

The only claim made by the appellant on this appeal is

that the trial court erred in refusing him leave to amend his answer. There is no bill of exceptions. It is very certain that, upon the record before us, we cannot review this order. The order was discretionary, and cannot be reversed unless it appears that there has been an abuse of discretion. *Patten P. Co. v. Kaukauna W. P. Co.* 79 Wis. 331. This cannot be determined unless we are informed by the record upon what papers the court acted in making the order.

Upon this question the record before us is silent. The order itself simply says that the motion is denied. Having no means of ascertaining upon what the court acted in making the order, we are necessarily unable to say that there was any abuse of discretion.

Moreover, it is impossible to see how the appellant would have gained anything had the motion for leave to amend his answer been granted. Upon the former appeal in this case it was held, in passing upon the question of the necessity of a demand, that the order granting leave to bring the action, until set aside or vacated in some proper proceeding, is conclusive on the question of demand.

By the Court.— Judgment affirmed.

WEADOCK, Executor, Appellant, vs. RAY, Respondent.

September 25 — October 15, 1901.

County court: Setting aside order after time for appeal: Laches.

An application to the county court to set aside an order, after the time for appeal has expired, on the ground of fraud or mistake, is an application to the equity power of the court and will be denied if the applicant has been guilty of laches.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an appeal by the executor above named from a judgment of the circuit court for Douglas county affirming the judgment of the county court of said county, which denied the executor's petition to vacate an order of the county court dated August 7, 1893, requiring the executor to pay the claim of the respondent out of the assets of the estate of E. V. Mundy on or before October 7, 1893. The order which is sought to be set aside in this proceeding is the same order forming the basis of the action of *Roberts v. Weadock*, which has been twice in this court, the first appeal being reported in 98 Wis. 400, and the second appeal being decided herewith. *Ante*, p. 488. By reference to the two opinions above referred to, the facts with regard to the entry of the said order will be sufficiently ascertained without restatement.

After the decision of this court upon the first appeal, and in the month of February, 1898, *Mr. Weadock*, the executor, filed his petition in the county court of Douglas county to set aside and vacate the order of August 7, 1893, upon various grounds, among others that the county court had no jurisdiction to make said order; that the said executor was not served with any notice of the application for said order; that he did not authorize any attorney to appear for him on said application; that he did not appear personally at the time said order was made, and had no knowledge thereof; and that, as matter of fact, he had no assets of said estate in his hands with which he could comply with said order. The respondent, *Ray*, made answer to the petition, and the matter was heard before the county court, and resulted in an order denying the prayer of the petition. Thereupon, an appeal was taken to the circuit court by the executor.

In the circuit court a new trial was had, and the court made findings of fact in which he found, among other things, that the order allowing the *Ray* claim was made on the 7th day of August, 1893; that the appellant was not present or

represented by attorneys at the time said order was made, but was informed thereof by letter not later than August 15, 1893; that he failed to pay the claim as allowed, and that on February 16, 1894, application was made to the county court by the respondent, *Ray*, for permission to sue *Mr. Weadock* and the sureties on the bond; that, upon this application, *Mr. Weadock* appeared, and the matter was adjourned from time to time until October 16, 1894, when an order was made granting leave to sue *Mr. Weadock* on his executor's bond; that said action was brought November 20, 1894, and was thereafter tried, resulting in a judgment of nonsuit July 8, 1897, which judgment was reversed upon appeal to this court, and the action remanded for a new trial; that, at the time the order of August 7, 1893, was entered, *Mr. Weadock* had been acting as executor for two years; that the time for creditors to file claims had long since expired; that an inventory of the estate filed prior to August 7, 1893, showed personal property appraised at $37,215.34, and real estate appraised at $34,223.65, in the hands of the executor; that on said 7th of August, 1893, the executor knew that a considerable portion of the personal property was worthless, but had not disclosed such fact to the county court, and that the real estate had at that time depreciated about forty per cent. from the appraised value thereof; that the county court was on said date justified in finding, from the evidence before it, that the estate was sufficient to pay all claims that had been allowed or might be allowed against the estate, together with all expenses of administration; that on said date the executor had in his hands sufficient assets to pay all claims allowed against the estate and pending on appeal, together with all expenses of administration; that the total amount of claims allowed against said estate is $5,617.41, all of which have been paid except the claim of the respondent, *Ray*.

As conclusions of law, the court found that on August 7,

1893, the county court had jurisdiction of the subject matter of the order requiring the executor to pay the *Ray* claim, as well as jurisdiction of the parties, and that such order was properly made; that the fact that the attorneys for the respondent, *Ray*, who made application for said order, were not practicing attorneys in this state did not invalidate the same; and that the judgment of the county court refusing to vacate said order should be affirmed, with costs.

For the appellant there was a brief by *Thomas A. E. Weadock, in pro. per.*, and *George B. Hudnall*, attorney, and oral argument by *Mr. Weadock.*

For the respondent there was a brief by *Reed & Reed*, and oral argument by *Myron Reed.*

WINSLOW, J. This court having, for what seem to us good and sufficient reasons, affirmed the judgment in the case of *Roberts v. Weadock, ante*, p. 488, thus finally determining the liability of the executor to pay *Mr. Ray's* claim, it is difficult to see how any good purpose can be subserved by a reversal of the order here appealed from. The reversal, if made, would be absolutely barren of results beneficial to the executor.

But there does not appear to be any valid ground upon which a reversal of the order before us could be based. The findings of fact made by the trial court are amply sustained by the evidence, and upon those findings it is perfectly evident that the order of August 7th, requiring the executor to pay the respondent's claim, was properly made. Indeed, that question was nearly, if not quite, settled adversely to the appellant in the decision of this court upon the first appeal.

Furthermore, as pointed out in the opinion upon that appeal, the appellant, with full knowledge of all material facts, had ample opportunity to prosecute an appeal directly from that order under secs. 4031, 4035, R. S. 1878, and neg-

lected to do so; so that his present unfortunate predicament is to be attributed to his own neglect to avail himself of the remedies which the law affords.

It is entirely true that under proper circumstances the county court may set aside an order previously made, which was induced by fraud or mistake, and which ought not to have been made, and this even though the time for appeal from the order may have long since expired. *Estate of Leavens*, 65 Wis. 440; *Estate of O'Neill*, 90 Wis. 480; *Hall v. Hall*, 98 Wis. 193. But such an application is an application to the equity power of the court, and it will be denied if the facts show laches on the part of the applicant. *Thomas v. Thomas*, 88 Wis. 88; *Case of Broderick's Will*, 21 Wall. 503. That the appellant was guilty of laches in the present case cannot be questioned. In fact it was so held upon the first appeal.

By the Court.—Judgment affirmed.

MARTIN, Appellant, vs. CLARK, Respondent.

September 26 — October 15, 1901.

Stipulation of facts: Construction: Right to cut standing timber: License or grant of interest in land? Laws of another state: New trial: Newly discovered evidence.

1. In an action involving the title to timber claimed by each party under a separate grant from the same grantor, a statement in a stipulation of facts, that the second grantee purchased the right to cut the timber in question without notice of the first grant, when construed in connection with other statements relating to the recording of the first grant and its effect as constructive notice, is *held* not to have been intended to take out of the case the question of constructive notice.
2. Under the laws of Minnesota as declared in *Pine Co. v. Tozer*, 56 Minn. 288, a grant giving to the grantee the right, for a long period of time, to enter upon, cut, and remove, and when so cut and removed to own, control, and possess, all the merchantable pine

timber growing upon certain lands, is a conditional sale of standing timber and a conveyance of an interest in real estate, and not a mere naked license revocable at pleasure.

8. Except in case of a clear abuse of judicial discretion, an order granting a new trial because of newly discovered evidence will not be disturbed on the ground that the excuse given for not producing such evidence upon the trial was insufficient.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

On December 14, 1880, the St. Paul & Duluth Railroad Company, by a writing duly executed so as to pass title but not so as to entitle the same to be recorded under the laws of the state of Minnesota, in consideration of $3,046.16 in its preferred stock, conveyed to one Miller the right to cut and remove from certain land owned by said company, located in the state of Minnesota, the pine timber growing thereon, and to become the owner thereof as fast as severed from the land, but with the express condition that the timber should be cut prior to May 1, 1899, and that the grantee should have no right to remove any timber or logs from the land after that date. The writing was recorded in the office of the register of deeds of the proper county. June 27, 1882, and prior to the date of the second grant hereafter mentioned, said record was validated by the laws of the state of Minnesota and made constructive notice to subsequent purchasers of the land or any interest therein. April 14, 1898, the railroad company, in consideration of $250, by a writing duly executed, attempted to convey to Anna Dumas the privilege, till May 1, 1899, of cutting and removing the pine timber from such land. A quantity of timber was cut and removed under the second grant and was thereafter taken possession of by defendant, claiming title thereto under the prior grant, he having become the owner of whatever rights were conveyed by the railroad company to Miller. When this action was commenced defendant owned all right to the logs in question that could be acquired under

the first grant, and plaintiff all the right that could be acquired under the second grant. Plaintiff's right to the logs depended upon whether the grant to Dumas superseded the prior grant, either because the latter was a mere license and was revoked by the former, or because, if it was a conveyance of an interest in land, it was not effective as against Dumas because the second grant was made without notice to the grantee of the existence of the prior grant.

On the trial the parties stipulated, in effect, that if the first grant was in force when the timber was cut defendant was entitled to recover unless plaintiff was protected by the fact that Dumas purchased the right to take the timber from the land without notice of the grant to Miller. They also stipulated that the conveyance to Miller was recorded as above stated, and that facts existed requisite to entitle plaintiff to recover if the Miller grant was superseded by the grant to Dumas. It was stated in the stipulation that the timber was cut in good faith under the second grant without notice of the first grant. It was also stipulated that the parties might read as proof in the case such laws of the state of Minnesota and opinions and decisions of its supreme court as were applicable. Pursuant to such stipulation laws of the state of Minnesota were read in evidence, validating the record of the conveyance to Miller so as to make it constructive notice of such conveyance to subsequent purchasers of the land described therein prior to the grant to Dumas.

Judgment was rendered in favor of plaintiff. Seasonably thereafter a motion was made to set aside the judgment and for a new trial on the ground of newly discovered evidence. The newly discovered evidence relied upon was the decision of the supreme court of Minnesota in *Pine Co. v. Tozer*, 56 Minn. 288. In support of the motion affidavits were read excusing the failure of respondent's attorneys to bring such

decision to the attention of the court upon the trial. The motion was granted and plaintiff appealed.

For the appellant there was a brief by *J. A. Murphy* and *W. M. Steele*, and oral argument by *Mr. Steele.*

For the respondent there was a brief by *Ross, Dwyer & Hile*, and oral argument by *W. D. Dwyer.*

MARSHALL, J. It is evident that the court considered the stipulation, that Dumas purchased the right to cut the timber in question without notice of the prior grant to Miller, as meaning that Dumas had no actual notice of such grant; that it was not intended by the parties to the stipulation to take out of the case the question of whether the purchase was made with constructive notice of such grant by reason of the record of the instrument under which Miller claimed and the law of Minnesota validating it. That construction seems reasonable, inasmuch as the parties were particular to state, as part of their stipulation, facts as to the record. Unless it was intended by defendant's counsel to rely on constructive notice of the Miller conveyance, basing such reliance on the law of the state of Minnesota validating the record thereof, the facts as to the record itself were entirely immaterial: there was no necessity whatever for bringing them to the attention of the court.

It is conceded that the case is governed by the law of the state of Minnesota, but appellant insists that it was error to grant the new trial to enable counsel for respondent to put in evidence and have considered the decision of the supreme court of such state in *Pine Co. v. Tozer*, 56 Minn. 288, because such decision would not change the result of which defendant complained. That depends upon whether the court decided in such case that an instrument similar to the one in question is a conveyance of an interest in land and not a mere revocable license. A careful reading of the opin-

ion satisfies us that the court there had under consideration a contract substantially like the one in question and held that the grantee therein was not a mere licensee; that he was a conditional owner of the standing timber; that he obtained by his grant the absolute right to take such timber from the land and to own the logs made therefrom on condition that the cutting and removal of the timber should take place within the time named in the grant. The court called attention to these features of the grant: The grantee obtained the right for a long period of time to cut and remove the timber. He obtained such possession of the land as was necessary to enjoy the principal thing granted. He paid a large sum of money in advance of the time when it was contemplated by the parties to the grant that the right to cut the timber should be exercised. He paid for and was granted things annexed to the freehold, with a right to the soil for the purpose of the growth of the granted things till they were severed from the soil. Under such circumstances the court said the grantees "had undoubtedly an interest which would have been subject to seizure and sale upon execution, not as personalty, but as real estate. Their interest was not that of a licensee,—simply to go upon and occupy the land and cut and remove timber until the license was revoked; but there was a valid grant of the right and privilege of occupying the land and cutting and removing the timber, a part of the realty, which, when severed, would become personalty. They had acquired rights which could not be taken away from them. If what they held under these contracts was not an interest or estate in real property it is difficult to conceive an interest or estate, less than a fee, which would be." When we consider the significant words of the agreement which the court there had under consideration, and those in the grant to Miller, the applicability of the language quoted to the facts of this case is clear. Here the words of the grant are: "The right, privilege, and permis-

sion to enter upon, cut, and remove previous to May first, 1899 [a period of about nineteen years], and when so cut and removed to own, control, and possess all the pine timber fit for saw logs growing upon," etc. There the language of the agreement was: "The right, privilege, and permission to enter upon said lands and cut and remove said timber at any time previous to the first day of May, 1899," a period of about eighteen years, "all of the pine timber, fit for merchantable saw logs, standing, growing, or being upon," etc., "and when so cut and removed . . . to control, own, and possess said timber." The granting clause in each instrument is followed by language to the effect that the timber when cut from the land should be the property of the grantee. The effect of the decision clearly is that in Minnesota such a contract as the one under consideration is not a mere naked license which can be revoked at pleasure before its execution, but is a license coupled with an interest in the thing, the real estate,—in effect, a conditional sale of standing timber. That is contrary to what the trial court understood the law of Minnesota to be when the judgment was rendered, and contrary, rather than in addition, to the evidence that was then before the court. It was, therefore, rightly decided on the motion that, had the evidence as to the true state of the law of Minnesota been produced upon the trial, the result might or would have been different.

It is strongly urged by counsel for appellant that no sufficient excuse was given upon the motion to vacate the judgment for not bringing the newly discovered evidence to the attention of the court upon the trial. The decision of the court below upon that point cannot be disturbed except for clear abuse of judicial discretion. We do not deem it necessary to discuss at length the affidavits presented to excuse the failure to discover the evidence in time for the trial. To our minds they are at least sufficient to preclude us from

holding that there was an abuse of judicial power in treating them as satisfactorily excusing the neglect of counsel and warranting the relief granted.

By the Court.— The order appealed from is affirmed.

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McCORD, Appellant, vs. HILL, Respondent.

September 28 — October 30, 1900.
September 26 — October 15, 1901.

Public lands: Homesteads: Rights of conflicting claimants: Patent not conclusive: Premature proof: Fraud: Decision of land department construed: Curative act: Pleading: Interior department: Statutes in pari materia: *Preference right: "Re-entry" as homestead.*

1. If the land laws of the United States confer upon a person a right to public land upon the existence of certain facts, the right becomes fixed when those facts are found to exist by the proper executive officer. If, therefore, a patent is issued to one person when upon the facts so found another is entitled to the land, ultimate rights will not be changed thereby, but the patentee will be considered by the courts to hold in trust for him to whom the land in equity belongs.
2. In an action to charge a trust upon the patentee of public land, it was alleged, among other things, that on February 23, 1891, one J., who had settled upon the land in question before it was open for entry, made application to enter the same, which was rejected on the ground that defendant had already filed a soldier's declaratory statement covering the same land, but upon appeal the land commissioner determined that J.'s prior settlement and residence were established, and defendant's declaratory statement was ordered canceled; that in September, 1892, J. made proof that he had resided on the land nineteen months continuously, and was allowed to commute to a cash entry, although he had not resided thereon fourteen months from the date of his entry as required by the act of March 3, 1890; that some months later he sold the land to plaintiff; that after such sale the land commissioner entered an *ex parte* order declaring J.'s proofs premature and insufficient, and required him to furnish supplemental proofs showing compli-

ance with said act; that thereafter the land was reconveyed by plaintiff to J., and after the lapse of sufficient time he attempted to comply with said requirement, but his rights were contested by defendant, who claimed that J. did not settle on the land in good faith and that his residence thereon had not been continuous for the requisite period; that upon a hearing the register and receiver found that J.'s residence up to the time of the first proofs was satisfactorily established, but that his residence subsequent to his conveyance to plaintiff was merely for the purpose of acquiring title for the latter and could not avail J. in making supplemental proof; that such decision was confirmed by the commissioner of the general land office and the secretary of the interior, and the entry and commutation held for cancellation; that subsequently the act of Congress of June 3, 1896, was passed, providing that in cases of premature commutation, where no fraud had been practiced by the entryman in making proof, and where there was no adverse claimants whose rights originated prior to the making of such final proofs, the certificate of entry should be confirmed to the entryman; and that J. made application to the secretary of the interior for confirmation thereunder, which was overruled for the reason that "the entry was not made in good faith and the proof submitted by the entryman was fraudulent, as fully set forth" in the decision of the land commissioner on the contest over J.'s supplemental proofs. *Held*, that the proofs so found to be tainted with fraud were the supplemental proofs offered by J., and that such fraud did not debar him from taking advantage of the curative act of 1896.

3. In such a case it is sufficient for the plaintiff to allege absence of any testimony or proof on a given subject before the officers of the land department, without setting out the testimony in full, and upon demurrer such allegation must be given literal effect, leaving the plaintiff to make proof thereof according to the ordinary rules of evidence.

4. The provision of the act of June 3, 1896, that "whenever it shall appear to the commissioner of the general land office that" certain facts with reference to a premature commutation of a homestead entry exist, the certificate of entry of the homesteader shall be in all respects confirmed to him, etc., was not intended to create the commissioner into a special tribunal having exclusive jurisdiction to pass upon the existence of the facts necessary to relief under the act, but was intended merely to provide, *in pari materia* with the other land laws, for an examination and decision of those questions by the land department, presided over by the secretary

of the interior, and in which said commissioner and all other officers are but subordinates of the secretary, subject to his direction, control, and supervision.

5. Under the provision of said act of June 3, 1896, requiring as a condition of the commutation "six months' actual residence in good faith by the homestead entryman prior to such confirmation," etc., the six months' residence need not have been subsequent to entry, but merely prior to final proof.

6. A preference right of entry based on a contest, given by ch. 89, Laws of U. S. 1880, is a mere privilege to enter and not an entry or a re-entry within the meaning of the act of June 3, 1896, excluding a homestead or commutation entry from the benefit of its curative provisions where the original entry had been canceled and the land made vacant had been re-entered under the homestead act.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This was an action asserting full equitable title from the government to the plaintiff, and seeking to charge a trust upon the defendant, who had received the patent. The complaint is very long, but may be abbreviated as follows:

On February 23, 1891, certain lands in the county of Bayfield were opened to entry. One Jacobus, under whom plaintiff claims, had settled on the land in question about January 28, 1891, and on the 23d day of February aforesaid made application to enter the same, which was rejected, for the reason that the defendant had already made application therefor by a soldier's declaratory statement. Jacobus contested, and, after a trial and a decision in his favor by the officers of the land office, on appeal a decision was rendered by the commissioner of the general land office on April 29, 1892, adjudging Jacobus to have been an actual settler prior to said 23d day of February, and prior to the filing of *Hill's* soldier's declaratory statement, and therefore entitled under the law to make homestead entry. Upon those hearings the character of Jacobus's settlement and residence from about February 1st to the trial, May 11, 1891, was investigated and decided as a matter of fact. *Hill's* soldier's de-

claratory statement was ordered canceled, and the register and receiver was directed to allow Jacobus to enter the land. Time for appeal from that decision having expired, *Hill's* declaratory statement was canceled, and on July 7, 1892, Jacobus's entry allowed. Up to 1891 the law allowed a homesteader, at any time before the expiration of the five years required for continuous residence, to make due proof of his entry, settlement, occupation, and improvement, and to commute his homestead entry into a cash entry by paying the government price of the land. This *Hill* did on the 20th of September, 1892, making proof of continued residence on the land for more than nineteen months, which proofs were received, and the receiver's receipt acknowledging payment of $400 delivered to him, entitling him, on presentation, to receive a patent from the commissioner of the general land office. In the month of December, 1892, Jacobus sold the land outright to the plaintiff and one McLeod.

Subsequent to Jacobus's settlement on the land, about February 1, 1891, but prior to his entry on July 7, 1892, and to his attempted final proof, September 20, 1892, there had been enacted a law of March 3, 1891, providing, as a condition for commutation, that the proof must show residence and cultivation of the land for a period of fourteen months from the date of the *entry*. This act had not come to the notice either of Jacobus or of the officers of the local land office, but on the 15th day of May, 1893, the commissioner of the general land office entered an order *ex parte* holding Jacobus's proofs of September 20, 1892, premature and insufficient, because only about two months had then elapsed from the date of his entry, and required that he then furnish supplemental proof, showing residence and cultivation for the fourteen-months period subsequent to July 6, 1892, which, of course, could not be done, no matter how complete the residence, until September, 1893. On receipt of this information, Jacobus consulted attorneys, and was ad-

vised by them to have a reconveyance made to him from *McCord* and McLeod, and to resume his residence on the land, in order to be able to comply with the requirement of the land department. Such reconveyance was made on the 1st of September, 1893, and followed by a mortgage from Jacobus to *McCord* and McLeod for the amount of the purchase price which they had paid to him, and on or about September 20, 1893, supplemental final proofs were offered. Thereupon, and about September 30, 1893, the defendant, *Hill*, in the language of the complaint,

"filed in the general land office certain affidavits setting up and claiming that said Jacobus did not settle upon or enter said land in good faith for the purpose of making it his home, but for the purpose of speculation, and that after he had made final proof and commuted his homestead filing he sold the timber and the land, and had afterwards abandoned the land, and had abandoned the land for over six months prior to the date of said affidavits, to wit, September 30, 1893, and also filed with said affidavits the said deed from Jacobus and wife to said *McCord* and McLeod, and the said quitclaim deed from said *McCord* and McLeod to said Jacobus, and the said mortgage from said Jacobus to said *McCord* and McLeod, as hereinbefore stated. Thereupon, and on the 19th day of December, 1893, in accordance with a letter of the commissioner of the general land office of the 18th of November, 1893, a hearing was had on April 20, 1894, upon the questions raised by the contest and affidavits submitted by the said *Hill*, and said hearing having been had before the receiver and register at Ashland, Wisconsin, the contestant, *Hill*, appearing in person and by his attorney, and the said Jacobus by N. B. Wharton & Sons, his attorneys. Upon said hearing the contestant called witnesses, and also was himself produced as a witness. None of such witnesses gave any testimony whatever except as to the possession, occupation, and improvement of said land by the said Jacobus and his family. No proof was given on the part of any of said witnesses or the said defendant upon said hearing in any way tending to impeach the good faith of the entry of said Jacobus, all of said testimony relating to the question whether said Jacobus had actually resided upon said land. The said Jacobus called numerous wit-

nesses upon said hearing. All of the said testimony related entirely and exclusively to the character of the possession, occupation, and improvement of the said Jacobus upon said land, except the testimony of said Jacobus,"

which was to the effect that the continuation of residence after the conveyance to McLeod was in order to protect, as far as he was able, the title which he had in good faith sold. The complaint then continues:

"The plaintiff shows to the court that no evidence was given tending in any way possible to show that the said Jacobus, prior to his sale of said land to said *McCord* and McLeod, had any contract with them, or either of them, or with any other person or persons, to sell the said land, or tending in any way to show that he had made any contract or agreement that the title which he expected to acquire should inure to the benefit of any other person or persons except himself. No evidence was given that he had ever seen or known the said *McCord* or McLeod prior to about the time of his conveyance to them, and not the slightest evidence was given in any respect tending to impeach the good faith of his said entry."

After hearing upon this contest, the register and receiver made his decision on August 9, 1894, of which the material part is as follows:

"On October 6, 1893, *Hill* filed an application to contest Jacobus on the ground that the entryman never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the six months next preceding the making of his final proof, and that he had sold the land to one *W. E. McCord.*

"Letter H, of November 18, 1893, directed this office to order a hearing on the charges.

"The two questions to be passed upon are:

"(1) Did Jacobus abandon the land?

"(2) Was the sale of the land to *McCord* and McLeod a bar to the offering of supplemental proof?

"Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous

other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood. After learning that supplemental proof would probably be required, Mrs. Jacobus returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the cabin in March, went there again in the latter part of May, remaining two weeks, and returned for the same length of time in July. This was apparently her last stay upon the land until after supplemental proof was offered, September 20th. A small crop of vegetables and hay was raised that season, as in the two years before.

"Upon the whole, the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees.

"In December, 1892, about three months after making his premature proof, Jacobus sold the land to *McCord* and McLeod for a stated consideration of $4,250. September 1, 1893, the grantees named in the first instrument executed a quitclaim deed to same land and to Jacobus, the expressed consideration being $4,300. September 12, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage upon the land in favor of *McCord* and McLeod to secure a note for the amount of the stated consideration in the quitclaim deed from *McCord* and McLeod to Jacobus.

"The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent of the transferees, and for the purpose of acquiring title for them. This conclusion is strongly supported by the admissions of Jacobus upon cross-examination. Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that the reconveyance September 1, 1893, was made in good faith by all the parties, the slender residence by his wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he

had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances — the time at which the conveyance from *McCord* and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself — show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus's supplemental proof cannot be sustained, and that the entry should be canceled, and a preference right of entry awarded the contestant, *Hill*."

On appeal therefrom by Jacobus, the following decision was rendered by the commissioner of the general land office:

"*Register and Receiver, Ashland, Wis.*

"SIR.— On October 6, 1893, plaintiff filed contest affidavit, alleging that said Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation; that on September 20, 1892, defendant made final proof and commuted, and within a short time sold the timber and the land, and wholly abandoned it; that he did not reside on the land during the six months next preceding the making of his final proof, but instead lived at Iron River; that defendant testified falsely in making his final proof.

"Hearing was ordered by office letter H, of November 18, 1893, and was had with both parties present.

"August 9, 1894, you found for the plaintiff, and recommended the cancellation of the entry.

"September 5, 1894, the defendant appealed, assigning several grounds of error.

"It appears from the records that on September 20, 1892, defendant was permitted to commute his homestead entry to cash entry No. 5,534.

"By letter C, of May 15, 1893, you were directed to require Jacobus to furnish supplemental proof, as said . . . commutation was premature.

"It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description,— no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and *W. E. McCord* for $4,250 cash.

"On the question of residence, the testimony is very conflicting. Defendant's wife stayed on the land a part of the time, and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time, working at his trade. He made occasional visits to the land on the Sabbath day. It also appears that defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day. In reply to the question, 'Why was it that after you had made proof on the land, and you believed the proof to be good, and you had sold the land, that you still continued your residence on it?' he answered: 'For the reason, as I stated, that I sold this land, and, if there was such a thing, . . . I wasn't going to let the men that bought it from me be loser by it. I was going to make him all right. It wouldn't be much longer anyway,— only five or six months,— and we might do it, and we wouldn't lose anything by it. We had nothing to lose, and he had used us well, so I thought we ought to do it. . . . That was the reason and the only reason.' Plaintiff further testified that the land was reconveyed to him for the purpose of enabling him to make the proof; that it was to enable him to acquire title to it.

"In the case of *Cann v. Cannon*, 4 Land Dec. Dep. Int. 322, it was held that, 'after the submission of final proof and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim, and where bad faith is evident.'

"The *Case of Laird*, 9 Land Dec. Dep. Int. 527, is very similar to the one at bar. In that case it was held that 'one who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proof, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation.'

"In the *Case of Dougherty*, 10 Land Dec. Dep. Int. 79, the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead

entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

"The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and *McCord;* hence your opinion is affirmed, and defendant's homestead entry, and his cash entry for the land involved, is held for cancellation. You will so notify the parties in interest, and defendant of his right of appeal. Respectfully,

"EDW. A. BOWERS,
"Asst. Commissioner."

Upon appeal to the secretary of the interior, and on the 28th day of April, 1896, the said secretary affirmed the said decision of the assistant commissioner, and confirmed his finding of facts.

The complaint then alleges the passage of the act of June 3, 1896, which, so far as material, is as follows:

"That whenever it shall appear to the commissioner of the general land office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry, and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate; *provided*, that this act shall not apply to commutation or homestead entries on which final certificates have been issued, and which have hereto-

fore been canceled when the lands made vacant by such cancellation have been re-entered by the homestead act.

"Sec. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

The complaint then proceeds to allege that, at the time of the passage of said act, Jacobus's final certificate had not been canceled, nor the land become vacant, nor been re-entered by any one, but that his final certificate of September 20, 1892, was then outstanding; that after the adoption of said act of Congress of June 3, 1896, and about July 1, 1896, Jacobus made motion before the secretary of the interior for a review of his decision of April 28, 1896, affirming the decision of the assistant commissioner of January 23, 1895, and for confirmation of his entry, on the ground that said Jacobus was fully within the act of Congress of June 3, 1896; that upon said motion the secretary, by mistake of law, erroneously decided that Jacobus was not within the act of June 3, 1896, for the reasons set forth in the decision of the assistant commissioner of January 23, 1895; that the secretary, by mistake and erroneously, held and decided that, because Jacobus was unable to make supplemental proof after his commutation proofs had been made, he was thereby excluded from the provisions of the act of Congress; that on the contrary it is the true intent and meaning of said act to allow commutation entries provided the claimant was entitled to make the same at the time of submitting his commutation final proofs, which were afterwards held by the department to be premature, and that said act in no manner depends upon facts occurring after the submission of commutation proofs in any case;

"that it was never held by any of the officers of the general land office or the local land office, or of the department of the interior, in any of said proceedings, that the said Jacobus was not an entryman in good faith of the said land, or that there was any defect or fraud whatever in his entry of said land or in his final or commutation proof thereof,

but the only fact which was ever held against the said Jacobus in said proceedings was that, by reason of having conveyed said land after he had obtained said final certificates to the plaintiff and said McLeod, he was therefore precluded from making supplemental proof as required by the commissioner of the general land office, which supplemental proof became immaterial and unnecessary, under the act of June 3, 1896; that the said office decision of January 23, 1895, did not find any fraud or lack of good faith on the part of said Jacobus, but simply found and held that, because he had sold the land after receiving his final certificates, he could not make supplemental proof, and the plaintiff submits that the decision of January 23, 1895, was correct, inasmuch as the said Jacobus did not then own the land, and, if the title of said Jacobus depended entirely upon his ability to make such supplemental proof, he or his grantees could never have obtained a patent of said land, but inasmuch as it was found and determined by the land department, through all the stages of said proceedings, that he was an entryman in good faith, that his entry was entirely satisfactory down to the time of making final proofs, he was therefore brought clearly within the act of June 3, 1896, and the secretary of the interior, by error of law, improperly and unlawfully excluded him from the benefits of that act."

The said decision of the secretary of August 4, 1896, is in the words and figures following, to wit:

"*The Commissioner of the General Land Office.*

"SIR: Phillip W. Jacobus, through his attorneys, has filed a motion for review of departmental decision of April 28, 1896, wherein is affirmed the action of your office in holding for cancellation his homestead and cash entries for the N. W. ¼ of sec. 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin; also a motion to confirm said entries under the provisions of the act of Congress approved June 3, 1896. The applicant, in his motion for review, alleges that his case is in all respects similar to that of Herbert H. Augusta (on review, 21 L. D. 200), wherein it was held that a commuted homestead entry may be equitably confirmed if, after its allowance, the land was sold to a purchaser in good faith, and fourteen months' residence was thereby rendered impossible.

"The very essence of the decision confirming the entry in that case, however, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

"It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs.

"Both the motion for review and the motion to confirm are accordingly denied. The papers in the case are herewith returned. Very respectfully,

"HOKE SMITH,
"Secretary."

The complaint then alleges entry by *Hill* on September 7, 1896, and issue of patent to him, reconveyance by Jacobus to *McCord* and McLeod on October 31, 1896, and quitclaim by McLeod to *McCord*.

As a separate ground of recovery, the complaint also alleges that after the issue of the receiver's receipt to Jacobus, in September, 1892, to wit, in or about December, 1892, the plaintiff and McLeod, being then in negotiation for the purchase of the land from Jacobus, had an interview with the defendant, *Hill*, in which the latter stated to them that he did not have and would not make any claim to the said land; that he had been fairly beaten in his contest with Jacobus, and that, if the plaintiff and the said McLeod would buy the land, he would make no claim to it; that plaintiff and McLeod relied on such statements, and made the purchase from Jacobus for $4,250, which was actually paid; that thereafter, and about January 4, 1893, for the purpose of putting the understanding between the plaintiff and said *Hill* in writing, the parties entered into the following written agreement:

"For the purpose of making a settlement with *John F. Hill*, and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him

permission till the 1st day of May, 1893, in which to enter on said land to remove said logs, and to occupy the house on said land, and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut, nor allow any of his men to cut or destroy, any other timber. And, in consideration of said logs, I, *John F. Hill*, being duly sworn, on oath says that he is the man that made a soldier's application for said N. W. ¼ of 17–48–8 W., and I make this affidavit for the purpose of relinquishing all my right, title, and interest in and to said claim, which I do unto the United States. Signed, sealed, and delivered and agreed upon this 4th day of January, 1893.

"In presence of DANIEL MCLEOD
"W. H. PACKARD W. E. MCCORD [Seal]
"TRACY LYON JOHN F. HILL [Seal]."

Upon this foundation it is claimed that *Hill* is estopped from now claiming or holding the land against the plaintiff.

From an order sustaining a general demurrer to the complaint, the plaintiff appeals.

For the appellant there was a brief by *Sanborn, Luse & Ellis*, attorneys, and *Lyman T. Powell*, of counsel, a brief in reply by *Sanborn, Luse, Powell & Ellis*, and oral argument by *L. K. Luse*.

A. B. Ross, for the respondent.

The following opinion was filed October 30, 1900:

DODGE, J. 1. The general rules of law governing the controversy here presented are well settled, and not seriously controverted. They may be summarized as follows: The United States land laws, as between individuals, are deemed to be largely self-executing. If those laws confer a right to the land upon the existence of certain facts, then that right arises when the facts are found to exist by the proper officers of the government. The ascertainment of the facts upon which the land laws are to act is vested in the executive branch of the government, and in that particular department presided over by the secretary of the interior, and under him by the commissioner of the general land office.

When such facts are ascertained and decided by the executive officers, the rights of the parties are those conferred by the law. If, therefore, the secretary of the interior issue to one person a patent, when upon the facts decided by him another party is entitled to the land, ultimate rights will not be changed thereby, but the holder of the patent will by the courts be considered to hold in trust for him to whom the land in equity belongs. *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Lee v. Johnson*, 116 U. S. 48; *Sanford v. Sanford*, 139 U. S. 642; *Stewart v. McHarry*, 159 U. S. 643; *Parsons v. Venzke*, 164 U. S. 89; *Hawley v. Diller*, 178 U. S. 476.

In this case it is claimed that, upon the facts found and decided to exist by the executive officers, Jacobus became, by virtue of the act of June 3, 1896, vested with the right to the land,— complete equitable ownership thereof; that the refusal of the secretary of the interior to recognize this right, and his decision permitting the defendant, *Hill*, to enter upon the land, and awarding him a patent therefor, were mere mistakes of law, and ineffectual save to confer ostensible legal title upon *Hill*, which can rise no higher than that which the government then had, namely, a naked legal title in trust for Jacobus, the true owner, or his assigns. *Wis. Cent. R. Co. v. Price Co.* 133 U. S. 496, 506.

The question before us on this complaint is whether it appears clearly, and without substantial doubt, that the facts entitling Jacobus to the land not only existed, but were decided to exist by the executive officers, and that the action of the secretary was predicated, not upon a decision of facts adverse to that claimant, but upon a misapplication or mistake of law to the facts already decided to exist. It is claimed that the complaint shows, by facts specifically alleged and by the unavoidable construction of the various executive decisions contained therein, that up to June 3, 1896, it had been decided that Jacobus had duly entered the land; had

prior to September 20, 1892, resided thereon, in compliance with the homestead laws, for a period of more than fourteen months; and had made an honest proof of such settlement, residence, and entry, paid his money on commutation, and received the receiver's certificate therefor, constituting full paper evidence of complete equitable title; that the local land officer's findings of these facts were in no wise challenged, but impliedly confirmed, by the commissioner's *ex parte* order of May 15, 1893, which pointed out that, conceding such facts to be true, still, by reason of a law of which neither Jacobus nor the land officers had actual knowledge, it had been made necessary that there should have been fourteen months of residence after the *entry*, as distinguished from the settlement, whereas his residence, as appeared on the face of the papers, with no attempt at concealment, had only been a little over two months after such entry, whereby it resulted that the reception of the proofs and the issue of the receiver's receipt had been premature by nearly one year.

It is inferable, of course, from the act of June 3, 1896, that there were other cases of this sort; for that act was general, and undertook to provide that they who had duly entered and occupied the land, whose proof, if not characterized by any fraud, had been duly received in disregard of the act of 1891, and the only defect in which was its prematureness, should be the owners of the land, provided their entries had not prior to the act been canceled and no one else had entered. Clearly, if Jacobus had done nothing after making his proofs in September, 1892, and his entry had remained without formal cancellation, he would have been entitled to confirmation thereof, and to his patent, upon the passage of this enactment. He did, however, take further steps, and attempted in September, 1893, when fourteen months from his entry in July, 1892, had elapsed, to prove residence in good faith for his own benefit up to

that date, as the then existing law required. In this he could not but fail, for, relying on his supposed complete title, he had sold the land and abandoned his residence upon it. This fact was concealed in the affidavits whereby he attempted to make his later proofs, and on trial those proofs were held to be fraudulent, and he refused the land, although the final cancellation of his entry and certificate had not then taken place.

Following the act of 1896, and by reason of it, Jacobus made application for confirmation of his certificate of entry made in 1892, which it was claimed satisfied all the conditions of this act; thus practically ignoring the subsequent steps. The secretary of the interior denied that application by reason of "the practice of fraud in making proofs." It is conceded by the appellant, on the one hand, that if, upon any evidence, the secretary found fraud to exist as a fact in the premature proofs made in September, 1892, then his decision is final, and he was justified in refusing Jacobus his patent, under the act of 1896. But if he intended only to decide that fraud had been practiced in the proofs presented in September, 1893, then he made a mistake of law; for the reason that the good faith of such subsequent attempt to make proofs was not essential to Jacobus's right to a confirmation of his certificate of entry and to a patent under the act of June 3, 1896, such proofs being immaterial to that right. The question is therefore reduced to the somewhat simple one of the construction of Secretary Smith's ruling of August 4, 1896. It must not be forgotten, in approaching that question, that this one order was made upon two motions,— one was the motion to review his previous decision made April 28th, confirming the action of the commissioner of the general land office in denying Jacobus the privilege of making proofs in 1893. That was overruled, as the secretary states, for the reason "that the entry was not made in good faith, and the proof submitted by the

entryman was fraudulent, *as fully set forth in your office decision of January 23, 1895.*" Of course that decision related to the proof which was before the secretary for consideration, and not to a previous proof, held of no avail because tendered and received before the land officers had any right to receive it as the law then existed.

We have carefully examined all of the preliminary proceedings and controversies, as set forth in the complaint, and are constrained to the conclusion that the proofs, and only proofs, referred to by the secretary in this order as permeated by the practice of fraud, were the same proofs which the commissioner had found fraudulent, and the secretary as well, in affirming the commissioner's decision. It is hardly necessary in this opinion to go over the whole of this ground. The principal considerations are, however, that, up to the time of the motion on which this order of August 4th passed, no question had been presented, litigated, or discussed as to fraud in any proofs save those which were tendered in September, 1893, and it sufficiently appears from the complaint that the action of the secretary, both that of April 28, 1896, and August 4, 1896, was predicated on the record which had come to him from the district land officers through the commissioner for review. It must be remembered that the officers of the land department — either the local land officers, or the commissioner, or both — had already decided, first, that the settlement and residence up to the time of the entry, namely, from February 1, 1891, to July 6, 1892, were *bona fide* and satisfactory; again, in September, 1892, that such residence as the law required had continued, and that the entry, the proofs, and the application for commutation to a pre-emption entry at that time were *bona fide.* This conclusion, upon facts reached by the land officers, was in no wise impugned by the order of the commissioner made in May, 1893, to the effect that such proofs could not be considered, for that the new law

had required a residence of fourteen months after the entry, which time had not elapsed. Then came in September, 1893, the attempt to offer proof of continuous residence by Jacobus as a homesteader up to that time,—that is, through the year from September, 1892, to September, 1893,—when confessedly during that year Jacobus had sold out and gone off the premises, and when it was conceded that his attempt to resume occupation thereof under the guise of a return to him of the title was not with a view to making a homestead for himself, but for the purpose of protecting the title of his grantee,—a purpose meritorious enough *inter partes*, but fraudulent as to the government. Here came the protest by *Hill*, which attacked the good faith of Jacobus's entry and alleged the facts with reference to abandonment, conveyance, removal, and reconveyance. No suggestion in this protest was made that the original proofs offered and accepted in September, 1892, were characterized by any fraud or fraudulent practice, and no issue as to the *bona fides* of Jacobus in tendering those proofs was presented. Now, while it is doubtless within the power of the commissioner of the general land office and of the secretary of the interior to extend their examinations beyond the issues which may be formed by a protest, it is said in *Lee v. Johnson*, 116 U. S. 48, that such practice is not common, and we think it clearly appears from the context and language of the decisions of the local land officers, the commissioner, and the secretary that no such extension was made in this case. From the record set forth, it appears that the local officers persisted in the conclusion already reached by them,—that the residence of Jacobus, up to the time of allowance of his first proofs, was satisfactory. They, however, point out the acts subsequent to that time, which clearly established the fraudulent character of the proofs of September, 1893, from the government's point of view, and recommend cancellation of the whole proceeding by reason of that fraud. This is the

view which it seems to us the commissioner of the general land office adopted. In the light of the record on which he was passing, the language is adaptable to that view and to no other, and the fraud in the proofs then tendered and under consideration for acceptance was an abundant reason for refusing them, and thereby, as the law then stood, justified final action invalidating Jacobus's claim to the land *ab initio*. Had that conclusion been carried into effective judgment by a cancellation of his entry, it would have been justified, would have been final, and he would have been entitled to no relief under the act of June 3, 1896. The ultimate rendition of judgment, however, had been postponed so that his rights were still unadjudicated, though decided, when the act of 1896 came in and declared that they should be adjudicated upon the proof made in September, 1892, unless in making *such* proof fraud had been practiced.

It is therefore entirely clear that the proofs first mentioned in the secretary's order of August 4, 1896, as those which had been held fraudulent in the commissioner's decision, brought up and already affirmed on appeal, were the proofs of September, 1893, and the mere reading of the order leaves us in no doubt that he referred to and intended the same proofs in the latter part of the same order. Certainly no one could pass from consideration of the last proofs, affected, as they were, by events and acts peculiar to themselves, to those of the year before, which, if fraudulent, must have been so found upon wholly different reasoning, without noting in his order the very marked distinction and antithesis which must have been present to his mind. It is inconceivable that the secretary, after brusquely reaffirming the former decisions of his subordinates as to the 1893 proofs, should turn to those of 1892, and *reverse* the holding of the same subordinates thereon, in such phraseology as that used by him. Whether the secretary overlooked the fact that there were two sets of proofs, and assumed that Jacobus's

claim to confirmation and patent, under the act of June 3, 1896, was dependent on the *bona fides* of the same proofs as was his application for confirmation and patent previously considered, or whether, having the situation correctly in mind, he decided, as matter of law, that fraud in the 1893 proofs would preclude him from the benefit of his 1892 proofs under the new law, is perhaps not certain. Either mental attitude is such mistake as precludes the idea that he passed on the question of fraud in the proofs of September, 1892, as a fact, and such a mistake as can be reviewed and corrected by the courts. We reach the conclusion, therefore, that the complaint with sufficient certainty shows that Jacobus was denied his patent because of fraud in a transaction which under the law could have no effect upon his right thereto; that, as a result, the issue of patent to *Hill* conveyed only the title which the United States then had, namely, a bare legal title in trust for Jacobus, in whom the act of June 3, 1896, had vested full equitable title; and that the complaint states a cause of action to charge *Hill* with such trust in favor of plaintiff.

The respondent urges strenuously that the allegations of the complaint that no evidence was offered tending in any way to impeach the good faith of the entry of Jacobus, or tending in any way to show any purpose on his part to make the sale which, after the issue of his final certificate, he did make, are merely conclusions, and cannot suffice to render it sufficiently certain that evidence on that subject was not presented and considered, and that it is the duty of the plaintiff to set out all of the evidence in order that the court can draw its conclusions instead of accepting those of the pleader. This contention imposes too strict a rule for pleadings. Doubtless no judgment can go repudiating the conclusion reached by the executive department of the United States without full and clear proof of their mistake of law, but, under our statute, the complaint shall consist

of "a plain and concise statement of the facts constituting the cause of action" (sec. 2646, Stats. 1898), and is to be liberally construed (sec. 2668). Under these provisions, it is sufficient for plaintiff to allege as a fact the absence of any testimony or proofs on a given subject, which allegation we think must be accorded literal effect upon demurrer, leaving the plaintiff to make proof thereof according to the ordinary rules of evidence.

2. The plaintiff makes further contention that certain representations and agreements on the part of *Hill* estop him from making any claim of title under his patent from the United States. In view of the grounds upon which we have reached it, the foregoing conclusion as to the force of the action of the interior department seems to us conclusive against this contention. We have held that the refusal of title to Jacobus was based entirely on facts occurring subsequent to *Hill's* representations, those facts being: Jacobus's conveyance of the premises to the plaintiff, his abandonment thereof, and his fraud upon the government in attempting to revest himself with title and to make affidavit that, after such conveyance, he continued to occupy for himself. *Hill*, at most, could only estop himself by declaration of existing facts, except so far as he may be said to have entered into a contract performance of which might be indirectly enforced by holding him estopped from breaking it or from claiming the fruits of its breach. The allegations of the complaint on this subject are well summarized in respondent's brief as follows: *Hill* stated to appellant, first, that he did not have any claim to the land; second, that he would not make any claim to the land; third, that he had been fairly beaten in his contest with Jacobus; fourth, that, if appellant bought the land from Jacobus, *Hill* would make no claim to it; and, fifth, relinquished all his claim to the land to the United States. Of course, any declaration made by *Hill* as to his then existing lack of title

to the land could not estop him from subsequently acquiring and insisting upon a new and independent title not then claimed by him, and not inconsistent with his declaration. 2 Pomeroy, Eq. Jur. § 813; *Bushnell v. Scott*, 21 Wis. 457. Whether his assertion that he had been fairly beaten in his contest with Jacobus would estop him from assailing the good faith of the latter's entry or commutation proof, which had already been made, it is immaterial to decide, in view of the conclusion reached that that question was not considered and had no weight in bringing about the reclamation of the land by the United States. If, when the evidence is fully in, it shall be found that such assault on *Hill's* part was effective, a different question may arise, but for the purposes of the present discussion we may drop that assertion from view. None of his other declarations or promises is inconsistent with the claim which *Hill* now makes. He may well concede that he then had no claim to the land, and that he would not assert any claim which he then had to it if the appellant purchased it, and that he did in fact relinquish to the United States all claim which he then had. His present title may nevertheless stand; for, as we have held to appear by the complaint, the United States took the land away from Jacobus, not because of any claim which *Hill* had, and not because of any facts which existed at the time of *Hill's* representation, but because of acts performed by Jacobus afterwards. *Hill's* present title is predicated, not upon any claim that he then had, but upon the fact that he, by his protest, brought to the attention of the United States Jacobus's subsequent conduct, and in consideration thereof was given the privilege to purchase the land from the United States as a new and independent transaction. The conduct of *Hill*, therefore, so far as stated in the complaint, cannot estop him from asserting the validity of the title acquired by his patent, if it should ultimately be held that Jacobus's rights were properly canceled and destroyed,

unless, indeed, that were done upon the ground of facts existing at the time of the representations and denied thereby.

By the Court.— Order of the circuit court reversed, and cause remanded with directions to overrule the demurrer.

CASSODAY, C. J., and MARSHALL, J., took no part.

A motion by the respondent for a rehearing was submitted on the brief of *A. B. Ross*, attorney, and *W. F. Bailey*, of counsel, for the motion, and *Sanborn, Luse, Powell & Ellis, contra.*

The following opinion was filed February 1, 1901:

PER CURIAM. Motion for rehearing granted, provided, however, that reargument shall be confined to the following questions, viz.: First, whether, as conditions precedent to the confirmation of Jacobus's certificate of entry under the act of June 3, 1896, application to the commissioner of the general land office, proof of the necessary facts before him, and finding thereon by him, or either of those proceedings, was made essential; second, whether the six-months actual residence in good faith by the homestead entryman prior to the commutation, required by said act of June 3, 1896, was required to be subsequent to the date of entry; third, whether at the date of said act, June 3, 1896, Jacobus's entry had been canceled, and the land in question had been re-entered by the homestead act; fourth, whether the rights now claimed by the respondent are such that he is estopped to set them up against the appellant.

The cause was reargued September 26, 1901.

For the appellant there was a brief by *Sanborn, Luse & Powell*, and oral argument by *A. L. Sanborn* and *L. K. Luse.*

For the respondent there was a brief by *W. F. Bailey*, attorney, and *W. H. Stafford*, of counsel, and oral argument by *Mr. Bailey.*

The following opinion was filed October 15, 1901:

DODGE, J. 1. The first question submitted for reargument, namely, whether, as conditions precedent to the confirmation under the act of June 3, 1896, of Jacobus's previous commuted pre-emption entry, there was necessary an application to the commissioner of the general land office and proof of the necessary facts before him and finding thereon by him, is predicated upon the first clause of the act of June 3, 1896, "Whenever it shall appear to the commissioner of the general land office that," etc. The doubt suggested by these words, as pressed upon us in the motion for rehearing, was whether the purpose of Congress was to create the commissioner of the general land office a special tribunal to pass upon the existence of the necessary facts for relieving certain applicants for public lands from the effect of the act of March 3, 1891, or whether it was intended merely to provide, *in pari materia* with the other land laws, for an examination and decision of these questions by the land department, presided over by the secretary of the interior, and in which the commissioner of the general land office and all other officers are but subordinates of the secretary of the interior, and exercising one or another of the functions of that department, subject to direction, control, and supervision by the secretary. It is well known that in 1820 Congress for the first time attempted something like general legislation which should affect and regulate the management and disposal of the then considerable public domain, which had been derived from various sources and was obviously to increase vastly in extent and value. Since then legislation has been almost as frequent as the sessions of Congress; some of it scientific and deliberate, but much of it seemingly accidental and aimed at special details. Many of these acts, if construed according to their exact words, would have been subversive of certain phases of the obvious general policy of Congress with reference to this important subject; and in this field, perhaps more than almost any other of con-

gressional legislation, the construction placed upon the land laws from time to time enacted both by the department and by the courts has been that they were intended merely to be added to and become a part of a consistent system of legislation, and as enacted one by one were, so far as possible, to fall under and be controlled by those general provisions and regulations evidently intended to cover the whole field. A comparatively late illustration of this view is presented in the case of *U. S. v. Healey*, 160 U. S. 136, but there are many others which might be cited.

Since the incorporation of the land department into the interior department, whereby the whole business of the former was placed under the supervision and control of the secretary of the interior, there has been no element of the policy of Congress and of the public land system more prominent than that the secretary of the department of the interior should be the responsible head thereof; that through and by him spoke and acted the government of the United States with reference to the public domain; and an act which substituted some subordinate of his as the responsible and final representative of the government, free and independent of the secretary's control, would be a most startling innovation. It is therefore not surprising that we find that the act of 1896 under discussion was promptly assumed by the interior department to be but one more of the many laws directing the conduct of the land department, to be controlled in its execution by the general policy above outlined, whereby the commissioner exercised no more absolute power or discretion than he did generally with reference to the conduct of the land business. On July 9, 1896,— about one month after the enactment of the law,— we find the commissioner, having first obtained the approval of the secretary, promulgating regulations for the execution of this act by a circular published in 26 Land Dec. Dep. Int. 544. This circular provided that in certain cases then pending no

application to any officers need be made, but that the general land office would at once take them up for consideration without application. As to other cases it was provided that application should be made, not to the commissioner as a responsible and special tribunal, but, as in the case of all other land matters, to the local land officers, who should examine and report thereon, as upon other applications, not to the commissioner, but to the general land office. This circular, while emanating from the commissioner of the general land office, did not purport to emanate from him as the source of authority, but, in accordance with the usual practice of the land department, bore upon its face the sanction of the approval of the secretary. It was wholly inconsistent with the understanding that the establishment of rights under the act of 1896 was intended to be treated otherwise than the rights of other applicants under the general system of public land laws. Two instances are cited to us by counsel of the treatment of applications under this law in exactly the same manner as other applications for land, in that the power of the secretary of the interior to supervise, regulate, and control is recognized and exercised. *In re Hasselquist*, 24 Land Dec. Dep. Int. 351; *Kuepper v. Tripp*, 26 id. 561. To these may be added Jacobus's own application, over which the secretary unhesitatingly took jurisdiction without a thought that a new tribunal exclusive of himself had been vested with that authority. We find nothing to indicate that the line of construction thus adopted in the department has ever been varied, and these decisions, commencing at about the time of the passage of the act, and continuing thereafter, are, of course, very cogent in its construction. *U. S. v. Healey*, 160 U. S. 136.

In the case of *Buena Vista Co. v. I. F. & S. C. R. Co.* 112 U. S. 165, an act of Congress provided "that the commissioner of the general land office is hereby authorized and required to receive and examine the selections of swamp

lands, . . . and allow or disallow said selections and indemnity provided for," etc. A decision by him under such act was reversed by the secretary of the interior, and in the suit it was contended — as by the respondent here — that the decision of the commissioner was intended to be final and not appealable to the secretary. This contention was overruled, the court saying:

"There is nothing in the act which alters the relation between the two officers as otherwise established, or puts the decisions of the commissioner under that act upon a footing different from his other decisions."

In *Knight v. U. S. L. Asso.* 142 U. S. 161, the question of the relation of the secretary to the execution of the land laws — not only those existing at the time his general authority was defined, but such as might be thereafter enacted — was exhaustively discussed by LAMAR, J., who shortly before had been secretary of the interior. This discussion is so exhaustive, and the citation of statutes, precedents, and illustrations so complete, as to render further enlargement now unnecessary. The views there expressed are further supported by *Orchard v. Alexander*, 157 U. S. 372; *Parsons v. Venzke*, 164 U. S. 89; *Warner Valley S. Co. v. Smith*, 165 U. S. 28; *In re Sweayze*, 5 Land Dec. Dep. Int. 570; 17 Op. Att'ys Gen. 205.

In the light of the rules for construction of the land laws promulgated by these decisions of the supreme court of the United States and the practical construction given to the act of 1896 by the executive officers, we cannot doubt that it was intended to be carried out under the direction and supervision of the secretary of the interior. While he might, and generally did, require that rights claimed under it should first be submitted to the officers of the general land office, he did not thereby preclude himself from assuming direction and supervision upon direct application to himself, waiving such preliminary steps. In such case his decision

was the ultimate and final one of the executive branch of the government.

2. The second question submitted for argument was whether the words, "Whenever it shall be made to appear . . . that there was at least six months' actual residence in good faith by the homestead entryman prior to such confirmation," etc., required that such residence should be after the entry. Obviously, there is nothing in the words themselves to express such requirement, unless it lurks in the word "entryman." The suggested argument is that residence by an entryman can only exist after entry; before that claimant is not an entryman. This contention gives to that single word extraordinary force as a limitation, and we should be slow to believe that statute makers used it for that purpose, unless such intention were confirmed by context or other considerations. The word "entryman" may quite as naturally have been used merely to describe such person as was entitled to the benefit under the act of 1896. To be entitled to confirmation thereunder, one must have been a homestead entryman. We find the word thus used elsewhere in the same statute more than once; that is, as merely descriptive of the persons to whom that act applies. If used in the same sense in the clause under consideration, it would only require six months' residence by that person. That the same word is used in the same sense when repeated in a law is ordinarily to be presumed, unless a different purpose is plain. We can discover no reason, either in context or in the purpose of the legislation, to avert that presumption. On the contrary, we think that it is merely an adoption into this particular statute of a rule of the general land office which for many years had been applied to pre-emptors, whereby, in excess of the statutory conditions for acquiring title, they were required to have resided in good faith upon the land for at least six months before pre-emption certificate could issue. Since this requirement was

not statutory, the act of 1896, giving to homestead entrymen the same rights to pre-emption prescribed *by law* for those originally applying as pre-emptors, might have been construed as waiving this requirement for six months' residence in good faith prescribed only by regulation. It seems obvious that the clause in question was interpolated merely to avoid this result, and to require of homestead entry, as a condition of commutation into pre-emption, the same six months' residence in good faith as the regulation had previously imposed on all others; which residence had never been required to be subsequent to entry, but merely prior to final proof.

Another reason is now urged by appellant why the clause making right to confirmation under the act of 1896 dependent on six months' actual residence should not exclude the plaintiff, even if such residence must be subsequent to entry. That reason is that, as appellant now claims, his entry took place when he filed the necessary papers and paid the fee in February, 1891. He cites authorities seeming to sustain the position that the date of an entry of land is when the applicant having the right to enter completes all of the acts required of him to effect that result; that delay of the land officers to note on their books such entry cannot affect his rights, whether such delay results from hearing and deciding a contest or from any other cause. *Chotard v. Pope*, 12 Wheat. 586; *Lytle v. Arkansas*, 9 How. 333; *Shepley v. Cowen*, 91 U. S. 330; *Postle v. Strickler*, 3 Land Dec. Dep. Int. 42; *Gilbert v. Spearing*, 4 id. 463; *Goodale v. Olney*, 12 id. 324; *Coder v. Lotridge*, id. 643; *Bomgardner v. Kittleman*, 17 id. 209; *McDonald v. Hartman*, 19 id. 562. Since we have decided that the six-months residence is not required to be subsequent to entry, we do not need to pass upon this contention of appellant. If we should adopt this view, it would not change the result. We therefore consider that we ought not to pass on it, for its decision might sustain plaintiff's

right to the land independently of the acts of 1891 or 1896. In that respect it is an entirely new proposition, presented for the first time upon a rehearing limited by our order so as not to fairly include it, so that respondent cannot be said to have had reasonable opportunity to meet it. On the original argument of this case no question was raised as to the correctness of the commissioner's ruling that Jacobus's entry was of date July 6, 1892, and our consideration of the case proceeded upon assumption of such correctness. As the question was not raised or argued by counsel, so it was not considered or decided by the court. The several references in the former opinion to July 6, 1892, as the date of entry are to be construed, not as a decision of that fact, but merely as assumption of a premise from which the discussion of other questions proceeded.

3. The first part of the third question reargued we deem unnecessary of decision for the purposes of this case. Examination of various decisions of the land department of the United States and of federal courts leaves much confusion and doubt whether an order of the commissioner of the general land office that an entry be "held for cancellation" effectively cancels it if an appeal is taken therefrom, or whether its efficacy as a judgment of cancellation is complete only upon the expiration of the time for appeal without that right being exercised, or, if exercised, upon final affirmance by the secretary of the interior and communication thereof to the commissioner, followed by formal order of cancellation. There seem to be decisions and *dicta* supporting the different theories. *Johnson v. Walton*, 11 Land Dec. Dep. Int. 278; *McDonald v. Hartman*, 19 id. 547; *In re Northern Pacific R. Co.* 20 id. 191; *In re Hasselquist*, 24 id. 351; *Germania I. Co. v. James*, 89 Fed. Rep. 811; *S. C.* 107 Fed. Rep. 597. Since the effect of such acts must largely be ascertained by the holdings of the department, and ultimately by decision of federal courts, we deem it unadvisable to declare our view

thereon unnecessarily. We therefore withdraw the statement in our former opinion bearing on completed cancellation, as follows: "The ultimate rendition of judgment, however, had been postponed so that his rights were still unadjudicated, though decided, when the act of 1896 came in and declared that they should be adjudicated upon the proof made in September, 1892, unless in making such proof fraud had been practiced." We say that completeness of cancellation of plaintiff's entry is immaterial and unnecessary of decision because his right to confirmation under the act of 1896 was by the terms of that act defeated only in case there had been both cancellation and re-entry under the homestead act prior to June 3, 1896, or prior to application for confirmation; and the complaint clearly asserts that no re-entry had taken place. It not only categorically and in terms negatives such event, but also alleges that *Hill's* entry did not take place until September 7, 1896. This would seem conclusive upon demurrer that this call of the statute had not been complied with, but counsel for respondent urges that *Hill* had acquired a "preference right of entry" at some earlier date, which should be deemed that of his re-entry. Careful examination of the complaint discloses no such allegation, but if we should infer from the fact that Jacobus's attempt to make second commutation was defeated upon *Hill's* contest, and that the latter afterwards entered, that such entry was allowed by reason of preference right based in his contest, still the existence of such preference right is not an entry nor a re-entry, within the words of the act of 1896. Such right is a mere privilege to enter, and in no sense an entry. Sec. 2, ch. 89, Laws of 1880 (21 Stats. at Large, 140); *In re Hendrickson*, 13 Land Dec. Dep. Int. 169; *In re Davis*, 19 id. 489. Hence we conclude that, whether cancellation had or had not taken place, there certainly had been no re-entry, and plaintiff was not within the terms of the proviso to the act of 1896, so as to preclude him from right to confirmation under it.

After full consideration of all the reasons urged, we find none to lead us to recede from the decision formerly declared. It is therefore unnecessary to consider whether, if any of such reasons had been sustained, estoppel might successfully be invoked against respondent in urging them.

By the Court.— Order of the circuit court reversed, and cause remanded with directions to overrule the demurrer.

MARSHALL, J., took no part.

GRINDO, Respondent, vs. McGEE and others, Appellants. 111 531
113 279

September 26 — October 15, 1901.

Ejectment: Land contract: Right of possession: Tax titles: Fraud: Judgment: Immaterial error.

1. An executory contract for the sale of land which is silent on the subject of possession of the premises does not give the vendee any right of possession or entitle him to maintain ejectment against an intruder.
2. Plaintiff in ejectment had title to the premises and constructive possession by virtue of a tax deed issued to his grantor and duly recorded. Defendants claimed title and constructive possession under subsequent tax deeds which, however, had been fraudulently obtained by one of them while an agent of plaintiff upon tax certificates belonging to the latter. *Held*, that plaintiff was entitled to recover.
3. In ejectment where plaintiff's title is in fee simple and defendants' alleged title is palpably and wholly bad, the latter are not prejudiced by the failure of the trial court to adjudicate the extent and quality of plaintiff's estate as required by subd. 7, sec. 3084, Stats. 1898, and the error will therefore be disregarded.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

Ejectment. The plaintiff alleged in his complaint that he was the owner in fee simple of certain described prem-

ises, and that the defendants unlawfully withheld possession. The defendants answered by a denial of all the allegations of the complaint "not hereinafter expressly admitted or denied." They expressly denied that the plaintiff was, at the time of the commencement of the action, the owner in fee simple or otherwise of the land, or that he was entitled to the possession. As a further defense, they set up that they were in the constructive possession of said premises, and claimed title thereto, under two tax deeds to them from Chippewa county and the state of Wisconsin,—one dated July 25, 1898, based on the tax sale of 1895; and the other dated May 20, 1899, and based on the tax sale of 1896. Both of these deeds are set up in separate counterclaims as the basis of defendants' title, at the close of which appears the following allegation: "These answering defendants further allege that *Andrew Grindo*, the plaintiff named in the above-entitled action, was the former owner of said tracts of land described in the plaintiff's complaint herein and in the foregoing deeds." The plaintiff made reply to the counterclaim to the effect that plaintiff employed the defendant *McGee* in September, 1896, to purchase said land from one A. J. McGilvray. *McGee*, as plaintiff's agent, purchased said land and the tax certificates upon which defendants' deeds were based. A quitclaim deed from McGilvray was executed to plaintiff, but the tax certificates were held by *McGee*, and deeds taken as alleged, with intent to defraud the plaintiff.

The case was tried by the court without a jury. On the trial the court found that in 1892 the land was owned by one H. H. Hayden, who made an executory contract to sell it to plaintiff, and that plaintiff entered into and remained in possession of the land during the year 1894, since which time it had been vacant and unoccupied. On May 18, 1896, A. J. McGilvray took a tax deed of the land for the unpaid taxes of 1892. September 23, 1896, McGilvray sold said

land to plaintiff by quitclaim deed, and assigned the tax certificates for the years 1894, 1895, and 1896. The defendant *McGee* acted as agent of plaintiff in said transaction, and obtained for him a tax deed in January, 1898, based on the sale of 1894. Thereafter, and at the dates mentioned in the answer, *McGee* obtained said tax deeds in which the defendants *J. E. McGee* and *J. C. Stubbs* were grantees upon the tax certificates of 1895 and 1896, which were the property of plaintiff. As conclusions of law the court found the plaintiff was entitled to the possession of the premises, of which defendants had constructive possession at the time the action was commenced; that the defendants acquired no title or right of possession under their tax deeds; that plaintiff was entitled to the premises under his contract with Hayden, and that it was unnecessary for the determination of the action to decide the effect of the tax deeds to McGilvray and *Grindo*. Exceptions to the findings were duly filed. A judgment was entered, in which plaintiff was adjudged to recover possession of the premises described, with costs, but it did not adjudicate the nature or quality of plaintiff's title. The defendants take this appeal.

The cause was submitted for the appellants on the brief of *W. H. Stafford*, attorney, and *W. F. Bailey* and *J. P. Wall*, of counsel, and for the respondent on that of *Clarence C. & Arthur E. Coe.*

BARDEEN, J. The defendants make a general assault upon the judgment. The findings are claimed to be all bad because they are unsupported by the evidence. The conclusions are bad because they are contrary to law and not supported by the facts. The judgment itself is said to be bad because it fails to adjudicate the quality and extent of the plaintiff's title. That a case should be tried, and such a judgment entered as was entered in this case, in view of the plain provisions of the statute, is incomprehensible. It is

quite as easy to follow statutory requirements as to stray from them. If plaintiff's attorneys had consulted the statute, and kept within the lines prescribed therein, our labors would have been lessened, and their client's interests would have rested upon less precarious foundations.

The defendants insist that, testing the court's findings and conclusions by the evidence, the plaintiff has not shown either title or right to possession of the premises in dispute. The findings are very meager and unsatisfactory. The findings upon which the plaintiff's right of recovery is based are that in 1892 plaintiff made an executory contract to purchase the premises from one H. H. Hayden, whereby plaintiff agreed to pay $200 in cash and to make certain other payments in the future, and, when so made, Hayden was to convey; that in 1894 plaintiff went into possession, and remained during that year, since which time the land has been vacant and unoccupied. As regards the question of right of possession, the evidence fails entirely to support the finding. After the contract shown by the letters of Mr. Hayden was entered into, plaintiff left that part of the country, returning in 1894. He said: "I never fenced the land. I cut a few cords of wood on it. It must have been in 1894. . . . I cut some cord wood on it about two years after I bought it. I didn't cut cord wood on the land right after I bought it, because I went away from there in 1893." This is all the testimony in the case to support the court's finding. It is entirely inadequate. There was absolutely no evidence of plaintiff's right to possession. The contract with Mr. Hayden is silent on that subject. In *Northwestern I. Co. v. Meade*, 21 Wis. 474, speaking of a similar contract, this court said: "Under such a contract, which is silent on the subject of possession of the premises, the purchaser acquires no right of possession or entry until the purchase money is paid or tendered." The doctrine is further elaborated in Newell, Ejectment, 435, § 18, as follows:

"In the absence of an agreement to the contrary, the purchaser of real estate who does not receive a deed, but simply a contract for a conveyance at a future day, is not entitled to the possession of the land thus purchased. The principle is well recognized that the owner of the fee, as a general rule, is entitled to the possession of the land as against all persons not under some valid agreement from him; and not only so, but, when vacant and unoccupied, the fee draws to it, in contemplation of law, the possession. The mere fact that a person enters into a contract for the purchase of land does not entitle him to enter upon and hold it. It is true, the purchaser may acquire that right by the terms of the agreement or otherwise. But, in the absence of some agreement to enter, his possession in such case would be unauthorized, and the vendor might recover possession."

The text is supported by the case of *Williams v. Forbes*, 47 Ill. 148, and by the subsequent case of *Chappell v. McKnight*, 108 Ill. 570. Of course, a license to enter may be implied if the circumstances warrant, but here neither the proof nor the findings contain any fact from which such license can be inferred. The case therefore is barren of any fact or finding sufficient to support the right of plaintiff to maintain ejectment based upon the Hayden contract. Under the broad provisions of our statute (Stats. 1898, sec. 3074) probably the grantee of a land contract which gives a right to the possession of the premises may maintain ejectment against an intruder. But, when the contract and the proof fail to show a right to enter and hold, no right to recover possession can be sustained.

If this were all that was disclosed by the case, the judgment would have to be reversed. The court further finds that on May 18, 1896, one A. J. McGilvray obtained a tax deed of this land from Chippewa county on the tax sale of 1893. He fails to find that it was ever recorded, but that omission is supplied by undisputed proof. This deed vested title and the constructive possession of the land in the grantee. September 23, 1896, McGilvray conveyed by quitclaim deed to the plaintiff. The title to the land thereby

became vested in him, and was good against all the world, except those who were in a position to be prejudiced by his neglect to pay the tax upon which it was founded. The title outstanding in the tax deed claimant suffered no diminution by conveyance to plaintiff, except that he could not assert it against any person to whom he owed the duty of payment of taxes. He owed no such duty to defendants, and they are not in a position to contest it except as it was affected by the tax deeds set up in the answer. The proof shows that to permit them to assert such title would be to sanction a deliberate and outrageous fraud. The court found that the certificates upon which such deeds were founded were the property of plaintiff, and that the defendants had no claim thereunder. The court decided that plaintiff was entitled to the premises under his contract with Mr. Hayden, and that it was unnecessary to determine the effect of the tax deed to McGilvray. He was undoubtedly wrong in both propositions. As we have seen, plaintiff failed to show any right to possession under his land contract, but *did* show title and constructive possession under the McGilvray tax deed. Defendants recognized such title in their counterclaims when they alleged that the plaintiff "was the former owner of said tract of land." They alleged constructive possession in themselves under their tax deeds, but failed to allege that their deeds had ever been recorded. An unrecorded tax deed does not carry constructive possession of the land, and their answer was insufficient in that respect. But the proof shows that one of the deeds was recorded, and this was sufficient to support the case against them. The undisputed proof also shows a tax deed fair on its face to McGilvray, duly recorded, a conveyance of such title to plaintiff, and a claim of title by defendants. The proof amply supports the finding impeaching the defendants' title, and in the orderly administration of justice findings should have been made under the statute specifying "the estate which

shall have been established on the trial by the plaintiff" (subd. 7, sec. 3084), and the judgment should have been "in accordance with the verdict or decision of the court" (sec. 3086). Considering these statutes in *Emerson v. Pier*, 105 Wis. 161, this court said:

"The whole framework of the statute on the present action of ejectment contemplates that, while the recovery proper is, as anciently, merely a recovery of possession and damages, nevertheless in that judgment shall be adjudicated the quality and extent of the title upon which the right of possession is predicated, and a demand in the complaint for judgment for possession must be read, in the light of the statute, as demanding a judgment which grants possession upon a title the quality of which is to be adjudged at the same time."

It would seem, with a line so clearly blazed, there ought to have been little trouble in entering the proper judgment. But the judgment herein fails to determine the "quality or extent of the plaintiff's title." An important fact in the consideration of appeals is that the complaining party must show that some error has been committed prejudicial to his interests. The importance of having an adjudication of the title upon which plaintiff stands is greater when the estate sought to be established is dower for life or a term of years, at the expiration of which the defendants' right of possession may ripen. In a case like this, where the plaintiff's title is fee simple, with no reversionary interest in defendants, the injury upon failure to definitely adjudicate the quality of that title is not manifest. Defendants' claim of title rests entirely upon the tax deeds wrongfully taken by them. If they are wiped out, their claim to the land ends forever. Their title is so palpably bad that they have not sought to sustain it on this appeal. That being so, although it was error for the court to fail to adjudicate the extent and quality of plaintiff's title, we cannot see how they are injured thereby. The statute (sec. 2829) commands the court to disregard any error or defect in the proceedings

which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. We therefore hold that under the facts in this case the error mentioned is not such a one as to affect the substantial rights of the defendants.

By the Court.— Judgment affirmed.

HOLLISTER, Respondent, vs. MCCORD and another, Appellants.

September 26 — October 15, 1901.

Evidence: Laws of another state: Publication "by authority."

A publication entitled "Statutes of Minnesota, 1894," stating, on the title page, that it contains the statutes of that state in force December 31, 1894, compiled by W. and others, and containing, on the opposite page, an act of the Minnesota legislature entitled "an act relating to the compilation of the general laws of Minnesota by W. and others," designating such compilation as the general laws in force at the time mentioned, and declaring it to be competent evidence of the acts, etc., therein contained in all courts of that state,—*purports to be published* under the authority of Minnesota, within the meaning of sec. 4136, Stats. 1898, and is therefore presumptive evidence as to the laws of Minnesota in the courts of this state.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Sanborn, Luse & Powell* and *Henry L. de Forest*, and oral argument by *L. K. Luse.*

For the respondent there was a brief by *Ross, Dwyer & Hile*, attorneys, and *Davis, Hollister & Hicks*, of counsel, and oral argument by *W. D. Dwyer.*

CASSODAY, C. J. It appears from the record that this action was commenced March 8, 1900, in the circuit court for

Douglas county, to recover the amount of a judgment against the defendants and in favor of one Frank L. Doyle, rendered May 12, 1898, in the circuit court of the United States for the district of Minnesota, for $14,066 damages, besides costs to be taxed, in an action commenced July 15, 1897, which judgment was in all things affirmed by the United States circuit court of appeals October 2, 1899, and the costs thereon taxed and made a part of the judgment. That judgment was assigned to the plaintiff herein by Frank L. Doyle, February 19, 1900; being a few days before the commencement of this action. The answer of the defendant *Warren E. McCord* admits the rendition of such judgment, and its affirmance, and that no part thereof had been paid; but denies any knowledge, or information sufficient to form a belief, as to the making of such assignment, or whether the rate of interest on such judgment under the statutes of Minnesota was or is seven per cent. per annum, and denied all other allegations of the complaint. The answer of the defendant *McCord Lumber Company* makes similar admissions and denials, and also alleges that it is a corporation organized under the laws of this state, having its office and principal place of business at Superior; that, since April 1, 1897, it had no office or agency in Minnesota, and had done no business in that state; that July 15, 1897, while *Warren E. McCord*, the president of said corporation, was temporarily in Duluth, copies of the summons and complaint in the action in the federal court mentioned were delivered to him personally; that *McCord*, as president of the corporation, was then in Duluth for the purpose of conferring with certain individuals in relation to the delivery to the company of certain pine logs located wholly in Wisconsin; that August 3, 1897, the defendant corporation appeared specially, and moved to set aside such service, which motion was denied; that, by reason thereof, the defendant corporation appeared therein and went to trial upon the merits, and thereafter prosecuted its writ

of error from the United States circuit court of appeals; and that, by reason of such facts, it alleges that the federal court never got jurisdiction of the defendant corporation.

A jury being waived and trial had by the court of the issues so formed, at the close thereof the court found as matters of fact, in effect, that the *McCord Lumber Company* was a Wisconsin corporation, as stated; that the summons and complaint were served upon *Warren E. McCord* personally, and also on him as president of the corporation, July 15, 1897; that on motion to dismiss the action in the federal court for want of jurisdiction, and after full hearing upon affidavits and counter affidavits, that court, in February, 1898, found against both defendants as to the law and the facts, and that that court had jurisdiction of both defendants; that the order or judgment entered thereon had never been reversed nor set aside; that the judgment was entered and affirmed, and the costs taxed, as stated; that the assignment from Doyle to the plaintiff was made, as stated; that such judgment was obtained, entered, and docketed in the United States court May 12, 1898, and that the legal rate of interest thereon since the date of such entry was and is seven per cent. per annum, and that no part thereof had been paid. And, as conclusions of law, the court found that the federal court had jurisdiction of both defendants and the subject matter of the cause of action at all times during the pendency of that action in that court, and at the date of the entry of said judgment; that the defendants were and are indebted to the plaintiff herein on said judgment for the amount of damages mentioned, with costs and disbursements as taxed, and interest at the rate of seven per cent. per annum, amounting in all, on October 17, 1900, to $16,526.73, as damages. Judgment thereon was ordered accordingly. From the judgment so entered thereon for the amount of such damages, and $49.94 costs herein, as taxed, the defendants appeal.

On the trial, the court admitted in evidence two printed volumes, claimed by the plaintiff to be the laws of Minnesota. One of those volumes has printed upon the back the words and figures: "Statutes of Minnesota. 1. 1894. Sections 1 to 4821." And the other has printed on the back thereof the words and figures: "Statutes of Minnesota. 2. 1894. Sections 4822 to 8054, General Index." On the first printed page of volume 1 is the following:

THE
GENERAL STATUTES
OF THE
STATE OF MINNESOTA
As Amended by Subsequent Legislation, with which are Incorporated All General Laws of the State in Force December 31, 1894.
COMPILED AND EDITED BY
HENRY B. WENZELL, Assisted by EUGENE F. LANE
WITH ANNOTATIONS BY
FRANCIS B. TIFFANY and Others
AND A GENERAL INDEX BY THE EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM.

COMPLETE IN TWO VOLUMES
VOL. 1

CONTAINING THE CONSTITUTION OF THE UNITED STATES, THE ORDINANCE OF 1787, THE ORGANIC ACT, ACT AUTHORIZING A STATE GOVERNMENT, THE STATE CONSTITUTION, THE ACT OF ADMISSION INTO THE UNION, AND SECTIONS 1 TO 4821 OF THE GENERAL STATUTES.

ST. PAUL, MINN.
WEST PUBLISHING CO.
1894.

And the first printed page of volume 2 is the same, except that between the words "two volumes" and the words "St. Paul, Minn." are the following words and figures: "Sections 4822 to 8054 of the General Statutes, and the General Index." On the fly leaf opposite the title page of each volume is the following:

"LEGISLATIVE AUTHORIZATION.

"An act relating to the compilation of the General Laws of Minnesota by Henry B. Wenzell and others and to declare such compilation competent evidence of the law in all courts of this state.

"Be it enacted by the legislature of the state of Minnesota:

"Section 1. The General Laws of the State of Minnesota in force December thirty-first (31), one thousand eight hundred and ninety-four (1894) as compiled by Henry B. Wenzell and others, and entitled the General Statutes of the State of Minnesota, are hereby declared competent evidence of the several acts and resolutions therein contained in all courts of this state without further proof or authentication, and shall be known and cited as 'General Statutes 1894.'

"Sec. 2. This act shall take effect and be in force from and after its passage.

"*Approved February 26, 1895.*"

Counsel for the defendants make two objections to the judgment. One is in finding that the federal court had jurisdiction of the defendant corporation; and the other is in allowing interest at the rate of seven per cent. per annum upon that judgment. The only error assigned is in admitting in evidence the two volumes claimed to be the laws of the state of Minnesota. If those volumes were properly admitted in evidence, then it is conceded that the findings of the trial court are proper, both as to the rate of interest and the service of process and jurisdiction of the federal court. The only question calling for consideration, therefore, is whether such volumes were properly admitted in evidence. They were admitted in evidence by the trial

court under the provision of our statute which declares, that: "Printed copies of the statute laws, and all acts and resolves of the Congress of the United States, or of the legislature of any state or territory of the United States, *if purporting to be published under the authority* of their respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts, and on all other occasions, in this state as presumptive evidence of such laws, acts and resolves." Sec 4136, Stats. 1898. This statute required the trial court to admit such volumes in evidence, if they *purported* "to be published under the authority of" the state of Minnesota, or if they were "commonly admitted and read as evidence in" the courts of that state. As indicated in the statement, they are named on the outside as "Statutes of Minnesota. 1894,"—giving the respective volumes and sections. On the inside they are designated as "The Statutes of the State of Minnesota," and as containing "all general laws of the state in force December 31, 1894. . . . Complete in two volumes." These volumes, with such expressions outside and inside of them, may purport to contain the statutes of Minnesota in force December 31, 1894; but, in order to be admitted in evidence under the section of our statute quoted, they must purport "to be *published* under the authority" of that state. That requirement of our statute is, as we think, satisfied by the act of the legislature of that state approved February 26, 1895, and found on the fly leaf opposite the title page of these volumes. That act is given in full in the foregoing statement. The act is entitled, "An act relating to the compilation of the General Laws of Minnesota by Henry B. Wenzell and others;" and the act expressly declares them to be "the General Laws of the State of Minnesota in force December 31, 1894," as compiled by Henry B. Wenzell and others, and such statutes are thereby "declared competent evidence of the several acts and resolu-

tions therein contained in all courts of this [that] state without further proof or authentication." We must hold that such volumes do purport to be published under the authority of the state of Minnesota. Such, manifestly, is the meaning intended to be conveyed by the act of the legislature in question. Such is the meaning of the word "purport" or "purporting." Thus, under a statute similar to our own, it has been held in Alabama that:

"If the printed statutes of another state or territory purport on their face to be published by the authority of such government, they are admissible in evidence without further proof, although such publication may appear to have been done by a private person under the authority of the law-making power of such government." *Falls v. U. S. S., L. & B. Co.* 97 Ala. 417.

So, in Massachusetts, it has been held, that: "A volume purporting to contain the laws of another state, with the words 'By authority' printed on the title page, sufficiently shows that it is printed by authority of the legislature of that state to warrant its admission in evidence under" a statute similar to ours. *Merrifield v. Robbins*, 8 Gray, 150. To the same effect: *Wilt v. Cutler*, 38 Mich. 189; *Paine v. L. E. & L. R. Co.* 31 Ind. 283; *Leach v. Linde*, 70 Hun, 145, affirmed in 142 N. Y. 628; *Congregational U. Soc. v. Hale*, 29 App. Div. 396, 399. We must hold that the two volumes in question were properly admitted in evidence.

By the Court.—The judgment of the circuit court is affirmed.

111 545
55 LRA 828
56 LRA 709n
57 LRA 548n

HAWARDEN, Respondent, vs. THE YOUGHIOGHENY & LEHIGH COAL COMPANY, imp., Appellant.
SAME, Appellant, vs. SAME, Respondent.

September 26 — October 15, 1901.

Combination to injure business: Equity: Injunction: Parties: Action by one of many: Joinder of causes of action.

1. Persons have a right to combine for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other for which he may recover damages, notwithstanding such purpose, if formed and executed by an individual, would not be actionable. Thus, where the business of a retail coal dealer has been destroyed by a combination between the wholesalers and certain retailers, one of the purposes of which was to force out of business all retailers not parties thereto, he may recover from the members of the combination for the damage thus caused.
2. Under sec. 2604, Stats. 1898 (providing that one or more may sue for the benefit of the whole where the question is one of common or general interest to many persons), a retail coal dealer who is one of many persons injured by an unlawful combination between other coal dealers to drive out of business all not members of the combination, may maintain an action for the benefit of all similarly situated to restrain the continuation of the operations of the conspiracy.
3. A cause of action at law for damages to the plaintiff growing out of an unlawful combination cannot, under sec. 2647, Stats. 1898, be united with a cause of action in equity in favor of the plaintiff and others similarly situated to restrain further operations by the combination, since both causes of action do not affect all the parties.

APPEALS from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed on plaintiff's appeal; affirmed on that of the defendant.*

The plaintiff's complaint in this action attempts to state two causes of action: (1) A cause of action at law by the plaintiff, a retail coal dealer at Superior, to recover damages

of the defendants by reason of the malicious destruction of his business, resulting from an alleged conspiracy on the part of the defendants; and (2) a cause of action in equity by the plaintiff on his own behalf and on behalf of many others similarly situated to restrain the further enforcement of the alleged conspiracy. There are twenty-three defendants, who are divided into two classes; the first class being composed of certain foreign corporations and their agents at Superior, Wisconsin, who are termed in the complaint as "wholesalers," and the second class composed of certain retail coal dealers in Superior, who are called "retailers."

The first alleged cause of action states, in substance, that "between August 1, 1900, and September 15th of that year, 'the wholesalers' united and confederated themselves into a trust and combination in restraint of trade and commerce, and renewed and extended the scope of a previously existing concert, and created an active, vicious, and damaging trust and monopoly designed to limit, manipulate, and control the retail coal trade in and about the city of Superior, and to hinder and embarrass the plaintiff in his means of livelihood, and to damage his property; that prior to September 15th the coal trade at Superior was carried on upon this plan: 'the wholesalers' did not directly solicit retail trade of consumers, but sold to all retail dealers at the market price, and they resold to the public for gain at such price as they saw fit, without interference or restriction from 'the wholesalers;' that after September 15th 'the wholesalers' refused to sell plaintiff coal at any price, and they still refuse to do so, and 'the retailers' refuse to sell him coal at wholesale rates for resale, and they arrogate to themselves the privilege of retailing coal in Superior, backed up, as aforesaid, by 'the wholesalers;' that 'the wholesalers' gave exclusive right to retail coal from their docks to 'the retailers,' and determine at what dock any retailer should be permitted to buy coal and what not, and of whom they should not be

allowed to purchase. The complaint further alleges that the limitation of retailers was for the purpose of controlling retail prices of coal in Superior, to force out of the retail coal trade all persons obnoxious to 'the wholesalers,' and among others 'the plaintiff,' to secure large profits to 'the wholesalers' and 'the retailers,' to deprive the public of free competition in the retail coal trade, to create and maintain a monopoly of the coal trade; that 'the retailers' agreed with 'the wholesalers' not to cut retail prices of coal, to sell coal at prices prescribed by 'the wholesalers,' to not invade each other's territory, to purchase coal at certain docks, not to sell for the purpose of resale to any persons not elected by 'the wholesalers' to the privilege of retailing coal in Superior, to not enter into price competition among themselves, to pay for all their purchases in cash, to forego the honorable name of retail coal merchants and assume the name of sales agents, to not do anything or suffer anything to be done to overthrow said trust and open the doors to free competition; that on or about the 10th day of September, 1900, the wholesalers and retailers put said contract, agreement, and understanding in force against 'the plaintiff' and the public; that the refusal to sell coal to the plaintiff is done in pursuance of, and to carry out the purposes of, said combination, and for no other reason; that about two thirds of all fuel used in Superior is coal bought directly or indirectly of 'the wholesalers;' that 'the wholesalers' own practically all the coal docks in Superior, Wisconsin, and Duluth, Minnesota, engaged in local trade at those points; and at the same time the action of 'the wholesalers' and 'the retailers' forced out of business ten or more other retail coal dealers in Superior, and thereby they have established a monopoly of the coal trade in that city, against the law of this state, and raised the price of coal to the people of Superior; that the plaintiff, *Edward Hawarden*, in December, 1898, purchased a two-thirds interest in the established retail coal

business of James B. Collins and wife at Superior, and of the teams, tools, office, and appliances used by said Collins and wife in that trade; that Collins and wife had an established retail trade in coal, based upon the right of any person to go into the business and to buy of 'the wholesalers' at the market price for retail for all times; that *Hawarden* and Collins carried on the business until June, 1900, when *Hawarden* bought out Collins and the good will of the business; that the profits of their business during the seasons from September to June were $40 a month, and his profits from September, 1900, to April 1, 1901, would have been $55 a month; that, as a result of said conspiracy, plaintiff, *Hawarden*, was forced out of the business, and his trade destroyed, thereby suffering damage in the sum of $500."

In the second and equitable cause of action the allegations of the first cause of action as to the character of the parties and formation and objects of the conspiracy and its effects are substantially repeated, and it is further alleged that not only the plaintiff, but many other retail coal dealers in Superior, of whom eight are named, were forced out of business by reason of the conspiracy, and that the defendants intend to continue the conspiracy indefinitely in the future; that the action is brought by the plaintiff on his own behalf and on behalf of all other retail coal dealers belonging to said class who may desire to become parties to the action; and an injunction is prayed for, restraining the defendants from the further enforcement of said conspiracy and compelling the wholesalers to sell coal to the plaintiff and others of said class upon the same conditions that they sell to the defendant retailers.

The Youghiogheny & Lehigh Coal Company demurred to the entire complaint on the ground that several causes of action are improperly united therein. Said company also demurred to the first cause of action separately for the reason that it does not state facts sufficient to constitute a cause of

action, and to the second cause of action separately for the same reason. The circuit court overruled the demurrer to the first cause of action, and sustained the demurrer to the second cause of action, and *The Youghiogheny & Lehigh Coal Company* appeals from that part of the order overruling the demurrer to the first cause of action, and the plaintiff appeals from that part of the order sustaining the demurrer to the second cause of action.

For the plaintiff the cause was submitted on the brief of *D. E. Roberts.*

H. H. Grace, for the defendant.

WINSLOW, J. The first count of the complaint is claimed to state a cause of action at law to recover damages resulting from an unlawful conspiracy, and the second count a cause of action in equity on behalf of a class to restrain the further execution of the conspiracy, and both counts are challenged by demurrer for insufficiency of facts.

1. The gist of the first count is that the plaintiff was a retail coal dealer in the city of Superior; that the defendants, "the wholesalers," own practically all the coal docks at Superior and Duluth, and that a retailer cannot carry on his business at Superior unless he can buy of the wholesalers freely and without discrimination; that the wholesalers entered into a combination with the defendant retailers by which it was agreed that the wholesalers should sell coal to the defendant retailers, and to none others, for the purpose, among others, of forcing out of the retail trade all retailers not in the combination, and among others the plaintiff; that such agreement or conspiracy has been successful, and as a result thereof the plaintiff's business has been destroyed, to his damage. Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their

business and making greater gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State ex rel. Durner v. Huegin*, 110 Wis. 189, it was, in effect, repudiated. It is true that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice MARSHALL it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable. "Where the act is lawful

for an individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it."

These principles are decisive as to the first count in this complaint. The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegations of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated.

The conclusion reached renders it unnecessary to consider the effect of sec. 1747*e*, Stats. 1898, with regard to combinations in restraint of trade or commerce.

2. In the second count the plaintiff attempts on behalf of a class of persons, namely, the retailers who were excluded from the combination, to obtain equitable relief by way of a perpetual injunction restraining the continuance of the operations of the conspiracy. That courts of equity have jurisdiction to restrain such conspiracies when irreparable injury will result and legal remedies will prove inadequate or a multiplicity of suits be necessary, seems to be well settled. *Beck v. Railway T. P. Union*, 118 Mich. 497. That the conspiracy may be directed against a considerable number of persons as well as against one, cannot be doubted. We have, therefore, before us an unlawful conspiracy directed against a large number of persons, which has already resulted in driving out of business a considerable number of such persons, and which the defendants threaten to continue indefinitely against the whole class.

Plaintiff claims that this situation brings the case within that provision of the statute contained in sec. 2604, Stats. 1898, which declares, "when the question is one of common

or general interest of many persons, . . . one or more may sue for the benefit of the whole." The question as to the legality of this conspiracy is certainly one of common and general interest to all persons against whom it was directed and is being enforced. The complaint alleges that there are many of such persons, and we are unable to perceive any fault in the plaintiff's contention. It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz.: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of *George v. Benjamin*, 100 Wis. 622, and *Hodges v. Nalty*, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed "very numerous" is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons. These conditions are satisfied here, and we conclude that the second count states a good cause of action in equity by the plaintiff on behalf of himself and a class composed of all other retail coal dealers in Superior similarly situated.

Thus there are two good causes of action stated in the complaint, one at law and one in equity, both arising out of the same transaction. But here arises for consideration the general demurrer to the whole complaint on the ground that two causes of action have been improperly united. Though this demurrer was not specifically referred to in the order appealed from for the reason that the court held that but one good cause of action was stated, still it was, in effect, overruled, as a necessary result of that order.

The statute provides that causes of action, in order to be united in one complaint, "must affect all the parties to the action." Stats. 1898, sec. 2647. It is clear that this limita-

tion would be violated if the two causes of action in this complaint are allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action, whatever it be. But the second cause of action is a cause of action in favor of a large number of persons, constituting a class represented by the plaintiff. Potentially all of the class are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined. Pomeroy, Code Remedies (3d ed.), § 502.

These considerations are conclusive to the effect that the general demurrer to the whole complaint on the ground of improper joinder should have been sustained.

By the Court.—That part of the order overruling the demurrer to the first count of the complaint is affirmed, and that part sustaining the demurrer to the second count is reversed, and the action is remanded with directions to overrule the demurrer to the second count and sustain the separate demurrer to the entire complaint, and for further proceedings according to law.

BENOLKIN, Respondent, vs. GUTHRIE, Appellant.

September 26 — October 15, 1901.

(1) *Appealable order.* (2–4) *Deceit: Desirability of location for store: Expression of opinion: Damages.* (5) *Pleading: Construction.*

1. An order refusing to dismiss an action for noncompliance with sec. 2632, Stats. 1898 (relating to payment of the state tax, etc.), does not prevent a judgment from which an appeal may be taken, and is therefore not appealable.
2. Where a person was induced by false representations as to the quality of goods which had been purchased for a proposed department store to establish a millinery department therein with a first-class stock of goods, the fact that she was seeking a desirable location for such an establishment in the same city would not prevent her recovering damages caused by the deceit.
3. Representations made by the proprietor of a proposed department store, to a person contemplating the establishment of a millinery store, for the purpose of inducing the latter to locate in such department store, that, as an existing fact, he had purchased a first-class stock of goods for such store, including the various articles of ladies' wear of the best quality, are statements of fact material to the question whether such store would be a desirable place in which to conduct a first-class millinery business, and not mere expressions of opinion, and if false may form the basis of an action for deceit.
4. Allegations, in the complaint in an action to recover for such deceit, that but for said false representations plaintiff would not have purchased said millinery stock at all, and that by reason thereof, being unable to sell the goods, she suffered certain losses by depreciation, are *held* sufficient to show that the loss by depreciation was the result of the deceit.
5. A pleading cannot legitimately be subjected to any technical or narrow reading or construction for the purpose of determining its sufficiency, nor can it be condemned because all the essential facts are not clearly alleged without resort to inference.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action for deceit. The substance of the complaint is as follows: August 20, 1900, defendant, for the purpose of in-

ducing plaintiff to take space for a millinery department in a store to be established by him in the city of Superior, Wisconsin, and to incur the necessary expense for a first-class stock of millinery goods and the establishment and operation of such a department, falsely represented to her that he had purchased for said store a stock of goods of the finest quality,— better than was kept in any store then existing in Superior; that such stock included the various articles of the best quality for ladies' wear. Defendant knew such representations were false, but plaintiff supposed them to be true and had no means of knowing to the contrary. She relied upon such false representations, and, so relying, purchased a first-class stock of goods for a millinery department in defendant's store in accordance with his wish and at a cost of $1,121.72, and incurred other expenses in and about establishing and operating such department to the extent of $650.90, none of which expenditures would have been made except for such false representations. The stock of goods in fact purchased by defendant was of a very inferior quality and not suitable to invite such customers as would desire goods of the quality purchased and carried by plaintiff. The trade acquired by defendant would not and did not take plaintiff's goods. She sold $158.43 worth of her goods, leaving a balance on hand of the value, at cost price, of $963.29, but which, by reason of being secondhand and out of style, were not worth to exceed $321.10. Plaintiff made a lease of space in defendant's store for her millinery department in September, 1900. By reason of the premises plaintiff sustained damage in the sum of $1,298.09. Judgment was demanded for that sum with costs.

Defendant demurred to the complaint for insufficiency and upon the ground that several causes of action were improperly united. A motion was made for a change of venue on the ground of prejudice of the presiding judge, and an order was accordingly made. Thereafter, upon the ground

that such order had ceased to be operative because defendant had failed to seasonably procure the transmission of the record as the statute requires, the court entertained the cause for the purpose of hearing the demurrer. In the meantime a second motion for a change of venue and two other motions were made and denied, one of such motions being to dismiss the action for failure to pay the state tax and file the complaint as required by statute. The demurrer was overruled and an order was entered accordingly. Written exceptions were filed to the following orders: (1) Order refusing to extend the time for defendant to comply with the order changing the place of trial; (2) order refusing to dismiss the action for noncompliance by plaintiff with sec. 2632, Stats. 1898, and staying proceedings on the part of defendant; (3) order denying the second motion for a change of venue; (4) order overruling the demurrer. This appeal is from the second and fourth of such orders.

For the appellant there was a brief by *Arnold & Arnold*, and oral argument by *N. B. Arnold.* They contended, *inter alia*, that defendant's statements were merely general terms in regard to his own property, and, there being no allegation but that he bought the goods, his statements as to their quality could not be relied on. *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 60; *Sheldon v. Davidson*, 85 Wis. 138; *Warner v. Benjamin*, 89 Wis. 296; *Fowler v. McCann*, 86 Wis. 431; 14 Am. & Eng. Ency. of Law (2d ed.), 129, note 2; *Fargo G. L. & C. Co. v. Fargo G. & E. Co.* 37 L. R. A. 593, note pp. 604, 605, a and c; *Hedin v. Minneapolis M. & S. Institute*, 35 L. R. A. 417, note II.

For the respondent there was a brief by *J. De La Motte*, and oral argument by *T. M. Thorson.*

MARSHALL, J. It is too clear for argument that the order refusing to dismiss the action is not appealable. It did not prevent a judgment from which an appeal could be taken,

therefore does not satisfy the requirements of subd. 1, sec. 3069, Stats. 1898; and it is not claimed, and could not be, reasonably, that it satisfies any other provision of the law on the subject of appealable orders.

We have before us for consideration only the question of whether the complaint states a cause of action against defendant, though counsel have favored us with a lengthy argument to show, not only that the order which is not appealable, as indicated, is erroneous, but that two other orders, from which no appeal is taken, are also erroneous. Manifestly, we need not take further notice of that part of counsel's brief. In the argument challenging the decision of the demurrer, we find that the claim that two causes of action were improperly united in the complaint has been abandoned.

The first defect pointed out in support of the general demurrer is that the complaint shows that plaintiff did not do anything different from what she intended to do independent of the alleged wrongful conduct of defendant. That is predicated on an introductory allegation in the complaint to the effect that when respondent negotiated with appellant in respect to opening a millinery department in his store, she was 'seeking a desirable location for the purpose of conducting such an establishment to cater to the best trade in the city of Superior, wherein would be kept nothing but goods of the best grade and quality of everything in the millinery line.' It can hardly be argued from that, reasonably, that plaintiff would have selected defendant's store as a desirable location for her business had he not made the false representations charged against him, or that she would, had she not relied upon such false representations, have incurred the expense alleged. It seems that the complaint fairly shows that respondent established a millinery department in appellant's store, choosing that as a favorable location therefor upon the faith of the alleged

false representations. True, she intended to start a millinery store with a first-class stock of goods if she could find a favorable location, but she would not have cast her lot with defendant, as she alleges, except for his representations as to the kind of stock he purposed keeping and had in fact purchased, indicating that his store was to be of such a character as to draw to it customers who would desire the kind of goods she purposed keeping.

The next suggestion is that the representations made were mere expressions of opinion by one as to the quality of his own property, hence not actionable under any circumstances. To that counsel cites to our attention cases where it has been held that the mere casual expression of an opinion, or the expression of any opinion, as to the value of property, or any other mere opinion, is not actionable. There is no doubt about that principle, but it does not apply to the allegations of the complaint before us. It is there alleged that defendant represented, as an existing fact, that he had purchased for his store a first-class stock of goods including the various articles of ladies' wear of the best quality. It may reasonably be inferred from that allegation, and the one to the effect that plaintiff had no means of knowing whether such representation was true or false, that the goods purchased by appellant were not where respondent could have inspected them and determined for herself their quality. The alleged false representations, under the circumstances, cannot be said to have been mere expressions of opinion. They were statements of facts material to the question of whether appellant's store would be a desirable place for respondent to conduct a millinery business. There is a wide distinction, ordinarily, between false representations of material facts, which, if made knowingly or without knowing whether they are true or false, for the purpose of inducing another to enter into a contract and incur expense, and which effect such purpose to the damage of such

other, are actionable, and the mere expression of an opinion as to value or as to some other fact. The representations alleged in the complaint belong to the former class. That seems too clear to warrant spending further time discussing it. The uniform rule is that a statement as to the character, or even the value, of property, where the same is at a distance, or so located that the person to whom they are made may reasonably rely thereon, for the purpose of inducing him to enter into a contract or incur expense or part with anything of value, is the statement of a fact, not a mere expression of opinion. *Horton v. Lee*, 106 Wis. 439; *Witherwax v. Riddle*, 121 Ill. 140; *Harris v. McMurray*, 23 Ind. 9; *McKnight v. Thompson*, 39 Neb. 752; *Henderson v. Henshall*, 54 Fed. Rep. 320; *Chrysler v. Canaday*, 90 N. Y. 272; 1 Bigelow, Fraud, 496.

The next objection to the complaint is that there is no allegation that respondent would have sold her stock had the representations complained of been true, or that the depreciation in the value of the stock was caused by the deceit alleged. There is an allegation in plain language that had it not been for the false representations plaintiff would not have purchased the stock of goods at all, and that by reason of the facts stated she suffered loss by depreciation to the extent of $642.19. Those allegations together seem to plainly cover the infirmity claimed. They show that respondent would not have placed herself in a position to suffer loss but for the deceit practiced upon her, and that she in fact suffered loss by depreciation of her property while trying to sell the same under the conditions to which defendant fraudulently induced her to subject herself.

It is further said, in effect, that there is no allegation that plaintiff was misled, not having an opportunity to see for herself the quality of the goods. On the contrary, there is a plain allegation that plaintiff neither knew whether the

representations made to her were true or false, nor had an opportunity for discovering the truth.

There are many other suggestions in the brief of counsel for appellant, why the complaint is insufficient, but none of them points out any substantial defect in the pleading which is found to exist on a careful reading thereof, applying thereto the liberal rules which the statute requires, in determining the intention of a pleader and the facts stated in the pleading, either expressly or by reasonable inference. A pleading cannot legitimately be subjected to any technical or narrow reading or construction for the purpose of determining its sufficiency, nor can it be condemned because all the essential facts are not clearly alleged without resort to inference. The statute, sec. 2668, Stats. 1898, commands that, "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties," and conformably thereto it has often been decided that "every reasonable intendment and presumption is to be made in favor of a pleading" (*Morse v. Gilman*, 16 Wis. 504); and that, if the essential facts can be discovered, as alleged in the pleading to exist, either by express statement or reasonable inference, "it must be held good though the allegations thereof be in form uncertain, defective, and incomplete" (*Flanders v. Mc Vickar*, 7 Wis. 372; *Horn v. Ludington*, 28 Wis. 81; *Miller v. Bayer*, 94 Wis. 123; *Pfister v. Sentinel Co.* 108 Wis. 572). Reading the complaint before us in the light of those rules, the defects claimed by counsel for appellant to exist cannot be discovered. We shall not take time to refer further in detail to the suggested defects. Those we have particularly referred to are a fair sample of the rest. The complaint sufficiently charges that the defendant made false representations to plaintiff in respect to material facts, to induce her to incur expense to establish a millinery department in his store; that she neither

knew nor had means of knowing whether such representations were false; that she relied upon them as being true, and was thereby caused to comply with defendant's desire in respect to establishing a millinery department, and in so doing expended the sum of money stated in the complaint, and by reason thereof suffered the loss therein alleged. That makes a cause of action in plaintiff's favor to recover damages. In sustaining the complaint we are not called upon to approve of it as to form. The necessary substance to make a cause of action being discovered, the pleading must be held good though it contains unnecessary allegations and the essential allegations are not clearly and closely connected, nor the facts stated with that particularity, conciseness, and perspicuity characteristic of an experienced pleader.

By the Court.— The order appealed from is affirmed.

JORGENSON and another, Appellants, vs. CITY OF SUPERIOR, Respondent.

September 27 — October 15, 1901.

(1, 2) *Statutes: Construction: Punctuation: Limiting words.* (3–6) *Municipal corporations: Superior city charter: Streets: Change of grade: Jurisdiction: Damages to abutting property: Remedies: Estoppel.*

1. Punctuation or the lack of it cannot be allowed to override plain rules for the construction of statutes.
2. Qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent unless the context or the evident meaning of the enactment requires a different construction.
3. Sec. 119 of the charter of Superior (ch. 124, Laws of 1891) provides that "before any established grade shall be changed or any work shall be done on any street, in whole or in part at the expense of the abutting or adjoining real estate, the board of public works

shall view the premises and determine the damages and benefits which shall accrue to each parcel of such real estate by such change or alteration of grade." *Held*, that a view of the premises and an assessment of damages is a jurisdictional prerequisite in all cases of change of grade, whether made at the expense of the abutting owner or not.

4. The provisions of said charter that the persons damaged by a change of grade "shall have a right to recover damages in the manner set forth" therein, and that the appeal to the circuit court therein provided for shall be the only remedy of the injured lotowner, apply only to cases in which the city is proceeding to make a change within and according to the power conferred by the charter, and do not deprive the injured lotowner of his right to maintain an ordinary action for damages where the city has acted without authority and without starting any proceedings from which an appeal could be taken.

5. Where the charter of a city gives it power to change established grades of streets, a lotowner affected by a proposed change is not required, at the peril of losing his rights, to watch the proceedings, and, if he discover any departure from the prescribed course of conduct, instantly commence proceedings by *mandamus* or otherwise to keep the city within due bounds.

6. Where the grade of a street has been changed by a city without jurisdiction or authority, an abutting owner injured by the change is not estopped by mere silence from recovering his damages.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This action was brought to recover damages to two lots owned by the plaintiffs, abutting on North Twenty-First street, in the city of *Superior*, resulting from the unauthorized change of grade of the street. The grade of the street was established in August, 1889, and in 1892 it was improved and paved at the expense of the landowners. It appears that the Eastern Railway Company of Minnesota had tracks crossing this street not far distant from plaintiffs' lots. In 1894 the city entered into an arrangement by which the railway company might build a viaduct over its tracks; the city to change the grade of Twenty-First street, and build the approaches to said viaduct, and to assume all liability

for damages growing out of the change of grade. In July, 1899, the common council adopted a resolution providing that the city should build the abutments and approaches to the viaduct, and directing the board of public works to change the grade of the street and advertise for bids and report to the council. The board thereafter changed the grade of the street so that it was elevated from curb to curb in front of plaintiffs' lots about nineteen feet above the old grade. The council approved the action of the board by a resolution adopted September, 1899. The city proceeded to build the approaches, and paid the expense from money in the hands of the city treasurer. No view of the premises was taken, and no assessment of benefits and damages was made by the board, and no compensation was ever paid plaintiffs for their damages. On the trial, evidence was offered as to the amount of plaintiffs' damages, and at the close of the testimony the court directed the jury to return a verdict for the defendant. From a judgment for defendant, plaintiffs have taken this appeal.

For the appellants there was a brief by *John Brennan*, and oral argument by *L. K. Luse*. To the point that the city having failed to assess the damages, the appellants can maintain this action and the statutory remedy is not exclusive, they cited 1 Lewis, Eminent Domain, § 206*b et seq.*; Elliott, Roads & S. (1st ed.), 349; *Goodrich v. Milwaukee*, 24 Wis. 437; *Dore v. Milwaukee*, 42 Wis. 108; *Meinzer v. Racine*, 70 Wis. 561; *Drummond v. Eau Claire*, 79 Wis. 97; *Liebermann v. Milwaukee*, 89 Wis. 336; *Pittelkow v. Milwaukee*, 94 Wis. 651; *Kersten v. Milwaukee*, 106 Wis. 200; *Harrison v. Milwaukee*, 49 Wis. 247; *Watkins v. Milwaukee*, 52 Wis. 98; *Addy v. Janesville*, 70 Wis. 401.

For the respondent there was a brief by *Arch'd McKay* and *Geo. B. Hudnall*, and oral argument by *Mr. Hudnall*. They contended, *inter alia*, that the charter having made provision for compensation where none existed at common

law, and also having provided a specific method to recover the same, other than an ordinary civil action, the remedy provided by the charter is exclusive. Sedgwick, Statutory & Const. Law (2d ed.), 343; Sutherland, Statutory Construction, § 399; Dillon, Mun. Corp. § 993; *Dore v. Milwaukee*, 42 Wis. 108; *Owens v. Milwaukee*, 47 Wis. 461; *Heiser v. New York*, 104 N. Y. 68; *Reock v. Newark*, 33 N. J. Law, 129; *Cole v. Muscatine*, 14 Iowa, 296; *White v. McKeesport*, 101 Pa. St. 394; *Perry v. Worcester*, 6 Gray, 544–546; *Flagg v. Worcester*, 13 Gray, 601–605; *Andover & M. T. Corp. v. Gould*, 6 Mass. 40; *Boston v. Shaw*, 1 Met. 130–138; *Dudley v. Mayhew*, 3 N. Y. 1, 15; *Hollister v. Hollister Bank*, 2 Keyes, 245–248; *Jordan & S. P. Co. v. Morley*, 23 N. Y. 552–554; *New York v. Lord*, 17 Wend. 284; *Dorman v. Jacksonville*, 13 Fla. 538. Where there is jurisdiction of the subject matter property owners are estopped from questioning the validity of the proceedings by standing by and permitting the work to be done without interposing any objection. Elliott, Roads & S. (1st ed.), 418, 419; *New Haven v. F. H. & W. R. Co.* 38 Conn. 422; *State v. Wertzel*, 62 Wis. 184; *Libstein v. Newark*, 24 N. J. Eq. 200–205; Herman, Estoppel, § 1221; *Strosser v. Ft. Wayne*, 100 Ind. 443. It was the duty of the plaintiff to insist that his damages be assessed in due time so that the municipality might forego the improvement if it deemed the assessment of damages unreasonable. *Curry v. Mt. Sterling*, 15 Ill. 320; *Hyde Park v. Borden*, 94 Ill. 26.

BARDEEN, J. The question arising on this appeal is whether, under the charter, the city of *Superior* has power to change the established grade of a street, when no assessment of benefits and damages is made, without liability to abutting lot-owners. The theory upon which the court below acted in directing a verdict for defendant was: (1) That the city was not liable for damages, and no assessment of benefits and

damages was required, under the charter, where the change in the grade was not made at the expense of the adjacent real estate. (2) If an assessment of benefits and damages was necessary, still this action would not lie. The plaintiffs should have proceeded seasonably by *mandamus* to compel such assessment, and, if not satisfied, have taken an appeal. (3) Plaintiffs are now estopped from questioning the validity of the proceedings. We will consider these questions in the order stated:

1. Sec. 113, ch. 124, Laws of 1891, provides: "The board of public works shall, subject to the review of the common council, have authority to establish the grade of all the streets and alleys of the city, and to change and re-establish the same as it may deem expedient: provided that wherever it shall change or alter the permanently established grade of any street, any person sustaining damages to his property abutting on such street by such change or alteration of grade, shall have a right to recover such damages in the manner set forth in this chapter." Sec. 119 provides: "Before any established grade shall be changed or any work shall be ordered done on any street, in whole or in part at the expense of the abutting or adjacent real estate, the board of public works shall view the premises and determine the damages and benefits which shall accrue to each parcel of such real estate by such change or alteration of grade; the entire cost of the contemplated work or improvement upon the street, the benefits and damages that will accrue to the several parcels of such real estate by such work or improvement, and the amount that should be assessed under the provisions of this chapter, to each parcel of such real estate to be benefited, as benefits accruing thereto by such contemplated work or improvements." Subsequent sections provided for the filing of their report, the giving of notice to hear objections, a notification to the council, and action by that body if deemed advisable, and a publication of notice

when a final determination has been made. An owner of any parcel of land who feels himself aggrieved by the determination made might appeal to the circuit court. Sec. 126 provides that the appeal so given shall be the only remedy the owner of any parcel of land shall have for the redress of any grievance he may have by reason of the change of any established grade covered by said report.

It seems clear from the provisions of sec. 113 that when the permanently established grade of a street is changed, and such change results in injury to the abutting lotowner, he is entitled to damages. Counsel for the city do not seriously controvert this proposition, except that they claim this right to damages is limited by the provisions of sec. 119. Their argument is that when the city decides, as it did in this case, to make such change of grade wholly at the expense of the city, there was no necessity for an assessment of damages or benefits. They claim that that clause in sec. 119 which reads, "in whole or in part at the expense of the abutting or adjacent real estate," refers to and modifies both disjunctive parts of the subject. They would have the section interpreted as if it read, "Before any established grade shall be changed in whole or in part at the expense of the abutting or adjacent real estate," then the board shall view the premises and make an assessment of damages and benefits. The punctuation of the section as printed gives some little color to this contention; but punctuation or the lack of it cannot be allowed to override plain rules of construction. The rule is that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction. Black, Interpretation of Laws, 150; *State ex rel. Holland v. Lammers*, 86 N. W. 677. There is nothing in the context or in the purpose of this section of the charter that requires a violation of the general rule of construction. The

clause quoted only relates to and modifies its immediate antecedent, and the section must be read to mean that before any established grade shall be changed the board of public works shall view the premises and make an assessment of damages and benefits, and before any work shall be ordered at the expense of the lotowner there shall also be a view of the premises, etc. Under this construction the action of the council was clearly illegal and unwarranted. The doubt expressed in *State ex rel. Taylor v. Superior*, 108 Wis. 16, as to the correctness of the construction contended for by the defendant, has become so substantial that we now have no hesitation in condemning such contention as unsound.

2. Under their second proposition, counsel for the city argue that, because sec. 113 says the lotowner "shall have a right to recover such damages *in the manner set forth in this chapter*," he can have no remedy for his injury except in accordance with subsequent charter provisions; that the charter having made provisions for compensation, and provided a specific method to recover the same, the remedy so provided is exclusive. The last proposition is unquestionably correct in a case where it is applicable. But is this such a case? The charter has mapped out a plan of action binding upon both the city and the injured lotowner. Under it the city must take the initiative in order to secure jurisdiction. It is a creature of the law. Its powers are limited to the terms of the grant, or to such as are implied therefrom and necessary to carry out the purpose of its creation. When a given course of action has been prescribed by law, that course must be followed. The charter says that, before it shall change the established grade of any street, it shall do certain prescribed things. This amounts to a prohibition against making a change in any other way. If it departs from the program laid out for it, and injury results therefrom, it is liable. This is the rule established by the follow-

ing decisions: *Crossett v. Janesville*, 28 Wis. 420; *Meinzer v. Racine*, 70 Wis. 561; *S. C.* 74 Wis. 166; *Drummond v. Eau Claire*, 79 Wis. 97; *S. C.* 85 Wis. 556. We need not enlarge upon the discussion therein contained. If the change is made under authority of law and with due care, the city would not be liable for consequential damages to abutting lotowners, unless made so by the statute. *Walish v. Milwaukee*, 95 Wis. 16. The provisions of the charter that the person injured by a change of grade "shall have a right to recover such damages in the manner set forth in this chapter," and that the appeal given shall be the only remedy of the injured lotowner "for the redress of any grievance he may have . . . by reason of the change of any established grade covered by said report," must be construed to refer to cases in which the city is proceeding to make a change within and according to the power conferred by the charter. If the city has no power to make a change of grade until its officials have made the proper assessment of damages and benefits, it follows necessarily that, if it attempts to do so without causing such assessment to be made, it must respond in damages to the parties injured thereby.

Nor does it lie in the mouth of the city to say that the lotowner must watch its proceedings, and if he discovers a departure from the prescribed course of conduct he must instantly commence proceedings by *mandamus*, or invoke some other appropriate remedy to keep it within due bounds. That he *may* do so if he acts vigilantly may be possible, but that he *must* do so at the peril of forfeiting his legal rights is not the law.

Counsel have seized upon the query suggested in *State ex rel. Taylor v. Superior*, 108 Wis. 16, of whether, the right to damages in such a case being statutory, and the charter providing a way in which such damages shall be ascertained, such remedy is not exclusive, and now urge those considerations as a reason why this judgment should be sustained. In

a case where either party is at liberty to take the initial step, or where the city has started properly but has neglected to do some act yet in its power to do to ascertain damages, this argument would appeal to us very strongly. See *Kersten v. Milwaukee*, 106 Wis. 200. But in the case at bar the city had no right to take a step until it had complied with the provisions of sec. 119. It had started no proceedings from which an appeal could be taken, and no opportunity was offered the plaintiffs to pursue the remedy furnished by the charter.

3. The ground upon which an estoppel is urged is that plaintiffs stood by and saw the work being done without interposing any objection. Undoubtedly there may be cases where silence or nonaction may be effectual to estop the delinquent party. Such are the cases cited in Elliott, Roads & S. (1st ed.), 419, but they are all or nearly all based upon the fact that the municipality doing the act had jurisdiction to do the act done, and was acting within the limits thereof, although informally. When the act done is without jurisdiction or authority, few if any of the cases recognize or enforce an estoppel. In this case the act of the city was wholly without authority. There are cases like *State ex rel. Taylor v. Superior*, 108 Wis. 16, where the granting of the relief sought lies in the sound discretion of the court, that the court may deny relief on the ground of laches. So, also, in cases where the adjoining property is being benefited by an improvement of a permanent character, the owner may not sit in silence and accept benefits, and then resist payment therefor because of error in the proceeding. See *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208. This is not such a case, and we are not prepared to say, from the evidence presented in the record, that plaintiffs are estopped from maintaining this action.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

PHŒNIX MANUFACTURING COMPANY, Appellant, vs. McCORMICK HARVESTING MACHINE COMPANY, imp., Respondent.

September 27 — October 15, 1901.

Mechanics' liens: Waiver: Intent: Chattel mortgages.

1. Sec. 3317, Stats. 1898 (declaring that the taking of a promissory note or other evidence of indebtedness for work or materials shall not discharge the lien therefor unless expressly received as payment therefor and so specified therein), does not change the common-law rule that the taking of independent security is a waiver of the lien if the parties so intended.
2. Where machinery is sold for the purpose of annexation to real property, the intention to waive the right to a lien on the realty is not to be inferred from the mere fact that, before the annexation, the vendor takes a chattel mortgage on the machinery as security for its purchase price.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

Between December 29, 1899, and March 7, 1900, the plaintiff furnished to the defendant Barnhart machinery consisting of boiler, engine, sawmill machinery, etc., to be wrought into a sawmill to be built by said Barnhart upon certain real estate held by him under land contract from the defendant Matthes, amounting in all to $470.03. Of this $434.40 were delivered on December 29th, the remainder on and subsequent to January 17, 1900. On January 12th Barnhart executed a chattel mortgage upon "all that certain personal property, to wit," the description including the property thus sold by the plaintiff and other chattels, with the statement, "All clear, except $234, given to *Phœnix Manufacturing Company*, Eau Claire, Wis., for purchase price." On January 17th Barnhart executed to the plaintiff a chattel mortgage for $225 (the unpaid balance) upon "the following described goods, chattels, and personal property, to wit," describing specific articles theretofore received from

plaintiff, securing a note for $225, due May 17, 1900. On June 2, 1900, plaintiff duly filed his claim for lien for the balance then due, consisting of the $225 balance due January 17th and $35.63 thereafter charged. Barnhart and Matthes interposed no defense. The defendant *McCormick Harvesting Machine Company* set up the receipt of the note and chattel mortgage of January 17th both as payment and as waiver of the right to mechanic's lien. The court made no finding of fact as to the intent with which the note and mortgage were received, but found as a conclusion of law that it had the effect to waive the right to lien for the indebtedness thereby evidenced and secured, and therefore denied lien for $225 of the claim, and awarded judgment of lien for the balance of $35.63. From this judgment the plaintiff appeals.

For the appellant there was a brief by *Teall & Thomas*, and oral argument by *De Alton S. Thomas*. They argued, among other things, that the plaintiff, by taking the note and chattel mortgage, did not waive its right to a mechanic's lien. *Mervin v. Sherman*, 9 Iowa, 331; *Gilcrest v. Gottschalk*, 39 Iowa, 311; *Peninsular G. E. Co. v. Norris*, 100 Mich. 496; Powell, Mortgages, 1062*b*; Phillips, Mechanics' Liens, §§ 272–276, 279; *Peck v. Bridwell*, 10 Mo. App. 524; *Union Stock Yards S. Bank v. Baker*, 42 Neb. 880; *Chapman v. Brewer*, 43 Neb. 890; Jones, Liens, § 1013; *Payne v. Wilson*, 74 N. Y. 348; *Howe v. Kindred*, 42 Minn. 433; *Charles Bechter Co. v. Cleveland*, 13 S. Dak. 347; *Chicago B. & M. Co. v. Talbotton C. & M. Co.* 106 Ga. 84; *Southern B. & L. Asso. v. Bean*, 49 S. W. Rep. 910; *Farmers' & M. Nat. Bank v. Taylor*, 40 S. W. Rep. 876; *Atlantic T. Co. v. Carbondale C. Co.* 99 Iowa, 234; *Case Mfg. Co. v. Smith*, 5 L. R. A. 231; *Maryland B. Co. v. Spilman*, 17 L. R. A. 601; *Chicago & A. R. Co. v. Union R. M. Co.* 109 U. S. 719; *McKeen v. Haseltine*, 46 Minn. 426; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Kilpatrick v. K. C. & B. R. Co.*

38 Neb. 620; *Kirkwood v. Hoxie*, 95 Mich. 62; *Allis v. Meadow Spring D. Co.* 67 Wis. 16; *Edward P. Allis Co. v. Madison E. L., H. & P. Co.* 9 S. Dak. 459; 3 Am. & Eng. Ency. of Law (1st ed.), 310, 311.

Arthur H. Shoemaker, for the respondent, contended, *inter alia*, that the taking of a mortgage as security is a waiver of the statutory lien, since it shows an intention to abandon the statutory lien and substitute in its place one of a higher nature. This is upon the ground that the two liens are inconsistent, rather than upon the ground of merger. Waiver of a statutory lien will result by implication from the acceptance of additional security. Kneeland, Mechanics' Liens, §§ 139, 139*a*; Phillips, Mechanics' Liens, § 280; *Gorman v. Sagner*, 22 Mo. 137; *Grant v. Strong*, 18 Wall. 623; *Trullinger v. Kofoed*, 7 Oreg. 228; 2 Jones, Liens, §§ 1519, 1524; Houck, Liens, 202, 208; *Taylor v. B., C. R. & M. R. Co.* 4 Dill. 570; *Central T. Co. v. R., N., I. & B. R. Co.* 31 U. S. App. 675; *Barrows v. Baughman*, 9 Mich. 213. The lien of a vendor of real estate is waived by taking a distinct collateral security. *Gilman v. Brown*, 1 Mason, 212; *Brown v. Gilman*, 4 Wheat. 255; *Fish v. Howland*, 1 Paige, 20; 4 Kent, Comm. 153; *Boon v. Murphy*, 6 Blackf. 272; *Dibblee v. Mitchell*, 15 Ind. 435; *Mayham v. Coombs*, 14 Ohio, 428; *Hunt v. Waterman*, 12 Cal. 301; *Camden v. Vail*, 23 Cal. 634; *Griffin v. Blanchar*, 17 Cal. 70; *Way v. Patty*, 1 Ind. 102; *Wilson v. Graham's Ex'r*, 5 Munf. 297; *Bradford v. Marvin*, 2 Fla. 463; *Williams v. Roberts*, 5 Ohio, 35; *Johnson v. Thompson*, 4 J. J. Marsh. 380; *Trustees v. Wright*, 11 Ill. 603; *Johnson v. Sugg*, 13 Sm. & M. 346; *Palmer's Appeal*, 1 Doug. (Mich.), 422; *Sears v. Smith*, 2 Mich. 244; *Baum v. Grigsby*, 21 Cal. 172; *White v. Dougherty*, Mart. & Y. 309; *Francis v. Hazlerigg's Ex'r*, Hard. 48; *Ducker v. Gray*, 3 J. J. Marsh. 163; *Gann v. Chester*, 5 Yerg. 205; *Campbell v. Baldwin*, 2 Humph. 248; *Ross v. Whitson*, 6 Yerg. 50; *Phelps v. Conover*, 25 Ill. 309; *Selby v. Stanley*, 4 Minn. 65; *Buntin v. French*,

16 N. H. 592; *Parker Co. v. Sewell*, 24 Tex. 238. Taking a mortgage for unpaid purchase money of real estate is an abandonment of the vendor's equitable lien, and such abandonment once fairly and voluntarily made is an abandonment forever. *Mattix v. Weand*, 19 Ind. 151; *Harris v. Harlan*, 14 Ind. 439; *Richards v. McPherson*, 74 Ind. 158; *Camden v. Vail*, 23 Cal. 633; *Young v. Wood*, 11 B. Mon. 123; *Shelby v. Perrin*, 18 Tex. 515; *Little v. Brown*, 2 Leigh, 353; *Coit v. Fougera*, 36 Barb. 195; *Perry v. Grant*, 10 R. I. 334.

DODGE, J. The single question raised upon this appeal is whether the plaintiff must, as matter of law, be held to have waived his right to a mechanic's lien upon the real estate into which was wrought the property sold by him for that purpose, by the act of taking for the purchase price thereof a promissory note and a chattel mortgage upon the specific chattels sold.

The preponderance of authority doubtless is to the effect that a mechanic's lien will be deemed waived either by taking therefor a promissory note maturing not until after the statutory time fixed for enforcing the lien, or by taking independent security. *Bailey v. Hull*, 11 Wis. 289; *Schmidt v. Gilson*, 14 Wis. 514; *De Forest v. Holum*, 38 Wis. 516, 524; Kneeland, Mechanics' Liens, § 138 *et seq.;* Jones, Liens, §§ 1013, 1519, *et seq.;* Phillips, Mechanics' Liens, §§ 273, 280. This rule has been modified by our statute, now sec. 3317, Stats. 1898, which denies any such effect to the taking of a note or other evidence of indebtedness. This statute, however, does not change the common-law rule as to the effect of taking independent security; nor has this court yet had occasion to decide as to the effect of such act, save in the one respect hereafter to be mentioned. The ultimate question is one of intent. If the parties, by their transaction, intended a waiver of the lien, no doubt such result is ac-

complished. If they intended that the lien should not be waived, but that the security should be taken merely as additional thereto, such intent will be given full effect by the courts. The significance, therefore, of such acts is evidentiary only. They may serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject. *Farmers' & M. Nat. Bank v. Taylor* (Tex. Civ. App.), 40 S. W. Rep. 876; *S. C.* 91 Tex. 78; *McKeen v. Haseltine*, 46 Minn. 426; Kneeland, Mechanics' Liens, § 138; *De Forest v. Holum*, 38 Wis. 525.

It has been held by a very respectable array of authority — even by those courts which raise an implication of waiver from the taking of independent security, as also by our own — that a mere reservation of title by the vendor of personal property intended to be wrought into real estate as security for the payment of the purchase price does not raise any such implication for the reason that it is in no wise inconsistent with the intent to claim the statutory lien upon the real estate, so soon as the personal property sold shall have become so affixed thereto that the lien arises. Jones, Liens, § 1015; *Chicago & A. R. Co. v. Union R. M. Co.* 109 U. S. 702, 720; *Case Mfg. Co. v. Smith*, 40 Fed. Rep. 339; *Hooven O. & R. Co. v. Featherstone*, 99 Fed. Rep. 180; *Clark v. Moore*, 64 Ill. 273, 279; *Cooper v. Cleghorn*, 50 Wis. 113. An interval of more or less duration may, and usually does, exist between the time when the property is sold and the time when it so becomes affixed. During that interval the seller is subject to various perils, such as the sale to others by his vendee of the property, or the levy thereon by other creditors; and, while he may be entirely willing to extend credit upon the faith of the lien on real estate to which the annexation of the personal property will entitle him, he is not willing to rely solely upon the credit of the purchaser during that interval. Hence his act in holding the specific property sold

as security for its purchase price may be ascribed wholly to his anxiety in the latter respect. Indeed, the very act of taking such security upon the property as chattels would seem to repudiate the idea that he was willing to rely on the personal responsibility of the purchaser, and therefore indicates that he does not intend to forego his lien upon real estate after the chattels sold had been wrought into it and thereby lost their character as personal property, so that his chattel security thereon is or may be destroyed,— a result which may well come, notwithstanding any agreement he might have with the purchaser of the chattels. *Gunderson v. Swarthout*, 104 Wis. 186, 190; *Fuller-Warren Co. v. Harter*, 110 Wis. 80.

No valid distinction is, nor, as we think, can be, suggested between an agreement reserving title in the vendor as security and one reconveying that title to him for the same purpose, namely, a chattel mortgage. The same object is sought to be accomplished in both instances, and the same inference of intent may legitimately be drawn from each. We are convinced that no intent or purpose can be ascribed to plaintiff to forego his statutory lien on the real estate when his chattels became annexed thereto merely because he took security upon those chattels while they still had that character. That would be to predicate a purpose of confidence or negligence upon acts of suspicion and vigilance.

The circuit court erred in the conclusion of law that plaintiff had waived his right to mechanic's lien for any part of the purchase price of the machinery and materials furnished by him, and, as consequence, in denying him judgment of lien for the full amount found due, together with full costs as against the defendant *McCormick Harvesting Machine Company*. The amount of those costs can only be ascertained upon taxation in the circuit court, and for that

reason we cannot fully correct the errors committed by modification of the judgment here.

By the Court.— Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for $269.33, with interest from March 7, 1900, and for mechanic's lien upon the premises described in the complaint, together with full costs.

ELLIS, Appellant, vs. BARRON COUNTY, Respondent.

111 576
113 179

September 27 — October 15, 1901.

Counties: Appeal from disallowance of claim: Bond.

An instrument in writing, under seal and witnessed, reciting that the principal obligor has appealed to the circuit court from the disallowance of his claim against a county by the county board, and stating that the obligors, as principal and surety, "do hereby undertake that the said appellant will faithfully prosecute said appeal and pay all costs that shall be adjudged against the appellant," was approved by the county clerk. *Held*, that although the instrument was not technically a bond and did not in form run to the county, it was a substantial compliance with sec. 683, Stats. 1898 (requiring the appellant in such a case to execute "a bond to such county, with sufficient surety, conditioned for the prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant"), and was therefore sufficient to confer upon the circuit court jurisdiction of the appeal.

APPEAL from an order of the circuit court for Barron county: E. W. HELMS, Judge. *Reversed.*

For the appellant the cause was submitted on the brief of *J. F. Ellis.*

For the respondent there was a brief by *W. N. Fuller*, district attorney, and oral argument by *E. N. Warner.*

CASSODAY, C. J. On November 13, 1899, the plaintiff filed a claim for $71.81 against the defendant county for the re-

payment of moneys which he had paid to the county for illegal tax certificates on lands not taxable. On November 16, 1899, such claim was wholly disallowed by the county board of supervisors; and on February 10, 1900, the plaintiff served upon the defendant a written notice to the effect that he thereby appealed from such disallowance to the circuit court for Barron county, as provided by sec. 683, Stats. 1898. At the same time the plaintiff executed and delivered to the defendant an instrument in writing, with the approval and indorsement thereon, in the words and figures following, to wit:

"State of Wisconsin, } ss.
"Barron County. }

"Whereas, the above-named *W. H. Ellis* has appealed to the circuit court of Barron county, Wisconsin, from the decision of the county board of said county, disallowing his claim against said county, which is more particularly referred to in the foregoing notice:

"Now, therefore, we, *W. H. Ellis*, as principal, and N. M. Rockman, as surety, do hereby undertake that the said appellant will faithfully prosecute said appeal, and pay all costs that shall be adjudged against the appellant.

"Witness our hands and seals this 7th day of February, 1900.

"In presence of
"J. C. ROCKMAN W. H. ELLIS (Seal)
"M. H. AAEN N. M. ROCKMAN (Seal).

"The foregoing undertaking is hereby approved.
"W. M. SIMPSON,
"County Clerk, Barron County, Wisconsin."

Such notice and undertaking was indorsed across the back thereof as follows: "Bond, *W. H. Ellis* and N. M. Rockman to *Barron County*. Approved this 10th day of February, 1900. W. M. SIMPSON, Co. Clerk."

April 11, 1901, the defendant appeared specially for the purpose, and moved to dismiss the appeal in the above-titled action, on the ground that the undertaking was not sufficient to give the court jurisdiction of the cause, for the

reason that the said undertaking is not in terms executed to the defendant. Thereupon the plaintiff, before said motion was decided, moved and asked leave to amend said undertaking by inserting therein the words "to *Barron County*, Wisconsin," after the word "costs" where it occurs therein, and to execute the same either as a substitute or amendment thereto or as an additional undertaking. Thereupon, and before said order to dismiss was made, the court ordered that the motion of the plaintiff be, and the same was thereby, denied, for the sole reason that the court had no power to grant the same. At the same time and place the court granted the defendant's motion, and ordered that the said appeal be, and the same was thereby, dismissed. From both of such orders the plaintiff appeals.

To appeal to the circuit court from such disallowance of the county board, it was necessary for the plaintiff not only to serve the written notice of appeal, as required by the statute, but also to execute "a bond *to such county*, with sufficient surety, to be approved by the county clerk, conditioned for the prosecution of such appeal and the payment of all costs that shall [should] be adjudged against the appellant." Sec. 683, Stats. 1898. The appeal was dismissed on the ground that the undertaking given was not a bond, within the meaning of that statute, and, besides, it did not run "to *Barron County*," the defendant in this action. It is true that the undertaking is not in the form of a bond, and does not in express terms run "to *Barron County*." It will be observed that the undertaking given is "that the said appellant will faithfully prosecute said appeal, and pay all costs that shall be adjudged against the appellant." This satisfies every condition which the statute required to be put in the bond. It is, moreover, under seal, executed by the plaintiff and a surety in the presence of two subscribing witnesses, and is approved by the county clerk, as required by the statute. But it is not in the form of a bond.

It is true, as contended by counsel for the defendant, that, to give the circuit court jurisdiction, it was essential that there should have been a substantial compliance with the requirements of the statute in respect to perfecting such appeal. *Drinkwine v. Eau Claire*, 83 Wis. 428; *West v. Eau Claire*, 89 Wis. 31, 35; *Oshkosh W. W. Co. v. Oshkosh*, 106 Wis. 83, 86. In one of the cases cited the plaintiff appealed to the circuit court from the disallowance of his claim by the common council, and on such appeal gave an undertaking, instead of a bond, as required by the charter of the city; and this court held, in effect, that the giving of the undertaking, which contained all the conditions which the charter required to be put in the bond, was a substantial compliance with the statute. *West v. Eau Claire*, 89 Wis. 31, 33, 35. Mr. Justice NEWMAN there said: "The question is whether the undertaking is a substantial compliance with the provisions of the charter providing for the security to be given to perfect an appeal in such cases. No doubt the statute must be strictly complied with in all matters of substance, or there is no appeal. The object of the provision for security is to provide indemnity to the city against loss of its costs in case it prevails upon the appeal. The security seems to be of no substantial value for any other purpose. . . . A substantial compliance is sufficient. So it would seem that the undertaking does furnish the city the indemnity for its costs which the charter intended. This makes it, in substance, a compliance with the charter." To the same effect, *C. & J. Michel B. Co. v. Estate of Wightman*, 97 Wis. 657, 660. We must hold that the undertaking contained all the conditions required by the statute quoted to be put in such bond, and hence was a substantial compliance with the statute in that regard. But it is said that the undertaking does not run to *Barron County*, as required by the statute. True, it does not name the county, nor in express words run to the county, but it requires the appel-

lant to faithfully prosecute the appeal, which, if done, must necessarily be against the defendant. It also requires the appellant to "pay all costs that shall be adjudged against the appellant." Of course, whatever costs the circuit court might adjudge against the appellant would necessarily have to be adjudged in favor of and paid to the defendant. So it does appear by necessary implication that the undertaking runs to the defendant, and is, necessarily, given for the sole benefit of the defendant. Looking at the substance of the undertaking, instead of the mere form, we are forced to conclude that it is a substantial compliance with the provisions of the statute quoted.

The trial court probably dismissed the appeal on the authority of *Thompson v. Thompson*, 24 Wis. 515, where it was held that the circuit court got no jurisdiction on the appeal from the county court, because the bond did not run "to the adverse party," as required by the statute then in force. Secs. 24, 25, ch. 117, R. S. 1858. The report of that case fails to reveal the fact, which appears in the record, that the bond in that case ran to "John W. Blackstone, Jr., judge of the county court," etc., instead of running to the adverse party, and, of course, was not available to the adverse party as security. The decision in that case was in harmony with prior decisions of this court. *Nelson v. Clongland*, 15 Wis. 392; *State ex rel. Tallmadge v. Flint*, 19 Wis. 621; *Bowles v. Page*, 20 Wis. 309.

It may be that in dismissing the appeal the trial court was influenced by a remark of Mr. Justice NEWMAN in one of the cases cited, and from which we have quoted. Among other things, he there stated, in effect, that the charter required "a bond," and that such requirement must be substantially complied with, and then said: "But the undertaking is a species of bond. No certain form is necessary to constitute a bond. It has only a few requisites. It must be in writing; it must name an obligee; it must be sealed

and delivered. The plaintiff's undertaking has all the requisites of a bond. It is technically a bond." 89 Wis. 35. But we are constrained to hold that, where the requirements of the statute are substantially complied with, and no substantial right of the adverse party is affected, it is sufficient, whether the undertaking is technically a bond or not. Sec. 2829, Stats. 1898; *Klauber v. Charlton*, 45 Wis. 600. The supreme court of Nebraska has recently held that "an undertaking for costs, meeting all the requirements of the statute under which it was given, is valid and enforceable, although no obligee is named therein;" and that "there is no substantial difference between 'a bond for costs' and 'an undertaking for costs;'" that "each expression is the recognized equivalent of the other." *McPherson v. Commercial Nat. Bank*, 85 N. W. Rep. 895.

It follows from what has been said that the undertaking was sufficient, and that the circuit court obtained jurisdiction, and that the appeal from the county board was improperly dismissed. This being so, it is unnecessary to consider the appeal from the order refusing to allow the plaintiff to amend the undertaking. The notice of appeal embraces both orders. But one bill of costs will be taxed in this court, and that will be in favor of the plaintiff. Sec. 3049, Stats. 1898; *Harrison M. Works v. Hosig*, 73 Wis. 184.

By the Court.— The order of the circuit court dismissing the appeal from the county board is reversed, and the cause is remanded for further proceedings according to law.

THE STATE EX REL. BOARD OF EDUCATION OF THE CITY OF SUPERIOR, Respondent, vs. HUNTER, City Treasurer, Appellant.

September 27 — October 15, 1901.

Taxation: County board: Levy of school tax in city: Voluntary payment: Mandamus: *Act not due: Demurrer: Pleading over.*

1. Whether or not secs. 1074–1076, Stats. 1898, authorize the levy by the county board of a school tax upon a city authorized by law to levy its own school taxes (a question not determined), if the taxpayers voluntarily pay a tax so levied it becomes a part of the school funds and should be dealt with by the treasurer as such.
2. *Mandamus* will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application.
3. Upon the overruling of a demurrer to an alternative writ of *mandamus* the defendant should be allowed to make a return upon terms.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This was an action of *mandamus*, brought against the city treasurer of the city of Superior for the purpose of compelling him to set aside out of the taxes to be collected by him for the year 1900 certain amounts for school purposes. The petition for the writ, which was filed January 30, 1901, after alleging the corporate character of the board of education, and its duties with reference to the schools under the charter of the city of Superior (ch. 152, Laws of 1889), further alleges, in substance, that in pursuance of its power and duty the said board did, September 26, 1900, levy the sum of $135,000 upon the taxable property of the city of Superior for school purposes, and that the amount of such levy was entered on the tax roll of the city for the year 1900, and that *R. L. Hunter*, the city treasurer of said city, has been, by warrant duly issued, commanded to collect said sum, and that the said treasurer is now in the act of collecting the same; that *R. L. Hunter* is the city treasurer of said

city, and by provisions of the charter is *ex officio* the treasurer of the board of education, and that it is his duty to keep in a separate fund all school moneys, whether levied by the state, county, or city, and keep a detailed account thereof, and pay out the same upon orders of the board of education; that the county board of Douglas county, in pursuance of its duty, determined the amount of taxes to be raised by each town and city in the county for the year 1900, and that the county clerk apportioned the amount to be so raised in the city of Superior at the sum of $7,732.73, and on November 24, 1900, said county clerk delivered to the city clerk of said city a certificate and statement of the taxes apportioned and levied on the city of Superior for said county and school tax purposes, in which statement the sum of $7,732.73 was included as a county school tax to be collected and retained by the city of Superior; that on December 15, 1900, said city clerk delivered to the defendant, as treasurer, a warrant for the collection of all the general taxes for the year 1900, by which said treasurer was directed to collect the same, and pay to the treasurer of said county the sum of $25,520.62 for state taxes, then to retain and pay out as city treasurer the sum of $368,998.75, and to pay to the treasurer for county purposes, on or before March 1st, the balance of the moneys collected,— attached to said warrant being a statement of the various items and taxes to be raised, among which was an item of county school tax, $7,732.73, in addition to the general school tax item of $135,000; that said city treasurer is in the act of collecting the taxes named in said warrant and statement, and that he will have collected in cash, as petitioner believes, sufficient taxes, before he is required to make the delinquent return to the county treasurer, to pay in full the state tax, the county school tax of $7,732.73, the general school tax of $135,000, and also a library tax of $5,500; that it is the duty of said treasurer first to pay to the county treasurer the state tax, then to set aside the sum

of $7,732.73, known as the "county school tax," and the further sum of $135,000, being the school tax levied by the board of education, and the further sum of $5,500 for library tax, before setting aside any sums for any other purposes of any kind; that said *R. L. Hunter* was the treasurer of the city of Superior for the year 1899, and that the county school tax for that year amounted to $7,154.91, and the district school tax to $110,000; that the whole amount of taxes for that year was $476,463.84, and that the city treasurer collected in cash $395,378.01, out of which the city treasurer, if he complied with the laws, should have paid the state tax and retained in his own hands the amount of the county school tax, and district school tax, and the library tax, and still have other moneys to apply for all other city taxes, and to pay in cash to the county treasurer a large sum on account of county taxes, but that, in neglect of his duty as such treasurer, he neglected to retain in his hands the said county school tax, but appropriated the same, and credited the same to other funds, and only applied to school purposes the sum of $4,500 thereof; that said *Hunter* now claims the right to set apart for the use of the city all taxes for city purposes prior to setting apart the said sum for county school taxes, and threatens so to do, and that petitioner believes that he will not consider said county school tax as a part of the sums levied for school taxes, and will not pay them over for school purposes until all the amounts levied for other city purposes are first paid and collected; that by reason of said *Hunter's* refusal to set apart the county school tax for the year 1899 out of the first moneys received by him said school board has been deprived of the use of said sum, and obliged to borrow money for the use of said schools, and that said *Hunter* will, unless otherwise ordered, refuse to set aside out of the moneys which he has collected and will have collected before returning his delinquent list to the county treasurer, said sum of $7,732.73, and that said school

board will thereby be deprived of the use of the same for school purposes. The petition prayed for a peremptory writ of *mandamus* requiring said *Hunter*, after the payment of the state tax, to set aside the two sums levied for county school tax and district school tax, amounting in all to $142,732.73, and the further sum of $5,500 for library tax, as soon as sufficient taxes are collected, and place the same to the credit of the *Board of Education of the City of Superior*.

The petition was verified by L. A. Nichols, secretary of the board of education, and an alternative writ of *mandamus* was issued thereon, whereupon the defendant moved to quash said alternative writ on the ground of insufficiency of facts, and also demurred upon the ground that upon the face of the petition and upon the face of the alternative writ no facts are stated sufficient to constitute a cause of action. The motions and demurrer were argued together, and were both overruled, and judgment entered awarding a peremptory writ of *mandamus* requiring the city treasurer, after payment of the state tax, to set aside the school tax and the library tax as soon as sufficient moneys therefor are collected, and place the school tax to the credit of the board of education. A peremptory writ of *mandamus* was issued in accordance with the judgment, and from this judgment the defendant appeals.

For the appellant there was a brief by *Archibald McKay* and *Geo. B. Hudnall*, and oral argument by *Mr. Hudnall*.

For the respondent there was a brief by *Knowles & Knowles*, and oral argument by *Edwin Knowles*.

WINSLOW, J. By the charter of the city of Superior (ch. 124, Laws of 1891), the board of education of the city is made a body corporate, and endowed with authority to manage and control the public schools of the city, and for that purpose to levy all necessary taxes. These taxes are

collected by the city treasurer in the same roll and under the same warrant as other general taxes. The city treasurer is made the treasurer of the board of education, and is required to receive all the public school funds, whether raised by the state, the county, the city, or district, as a separate fund, and pay the same out only upon the order of the board of education. By sec. 111 of the charter the city treasurer is required, out of the taxes by him collected, to first pay the state tax to the county treasurer, and then to "set aside all sums of money levied for school and library purposes," then taxes to pay the principal and interest on the public debt, then taxes for various other municipal purposes in order, and finally to pay the county taxes. It appears by the petition for the writ that in the year 1900 the board of education levied a tax of $135,000 for school purposes, that the county board of supervisors thereafter apportioned to the city the additional sum of $7,732.73 to be raised by the city for school purposes, and that both of these sums were placed in the tax warrant issued to the city treasurer, and that at the time of the filing of the petition the city treasurer was "in the act of collecting the same." It is further stated in the petition that in the previous year the sum of $7,154.91 was apportioned by the county board to be raised as an additional school tax by the city, and that the appellant, *Hunter*, then being the city treasurer, refused and neglected to retain in his hands, as treasurer of the school funds, the whole of said county school tax, but only retained $4,500 thereof for school purposes, and paid over the balance of said fund to the county treasurer, and that he now claims the right and threatens to set apart for other city uses all other taxes raised for city purposes prior to setting apart said sum of $7,732.73 for school purposes. It is not alleged that the treasurer has ever failed to properly set aside or account for the sums levied for school purposes by the board of education, or that he threatens now to do so, but

the gravamen of the petition is simply that he threatens to divert from its proper use a part of the so-called "county" school tax when it is collected by him.

It is argued on behalf of the appellant that this "county" school tax is an illegal and unauthorized tax, that it may never be collected, and hence that on this ground no writ of *mandamus* should issue in any event. This "county" school tax was levied in supposed conformity with secs. 1074–1076, Stats. 1898, which provide, in substance, that the county board of supervisors, at their annual meeting in November of each year, shall determine the amount of taxes to be levied for county purposes for the year, and the amount to be raised by each town for support of common schools, and that the county clerk shall apportion said county tax among the towns, cities, and villages of the county, and carry out the sums so apportioned, as well as the school tax to be raised as aforesaid, opposite the name of each of said towns, cities, and villages, and certify the same to the clerk of each of such towns, cities, or villages. The appellant's contention is that, so far as school taxes are concerned, these sections relate only to towns, and were not intended to, and do not in fact, authorize the levy by the county board of school taxes upon a city which is authorized by law to levy its own school taxes, as is the case with the city of Superior. The question so raised is a serious one, but we do not find it necessary, for reasons hereafter stated, to decide it in this action. Conceding that the tax was not authorized by law, still, if the taxpayers paid the same voluntarily, so that it reached the hands of the treasurer, no reason is perceived why the same would not become a part of the school funds in the hands of the treasurer upon the same footing as other school funds. *State ex rel. School Directors v. Nelson*, 105 Wis. 111.

But here arises the serious difficulty with the petitioner's case. It is nowhere alleged that this sum has come into

the hands of the city treasurer; in fact the petition distinctly negatives such fact by alleging that the treasurer "is in the act of collecting" the taxes named in his warrant, and will collect sufficient sums to pay in full the state taxes and school taxes before he is required to make his delinquent return to the county treasurer. We have no means of knowing whether the treasurer, at the time of the filing of the petition, had collected a dollar properly applicable to the extinguishment of the so-called "county" school tax. Clearly, the treasurer is under no duty to set aside any moneys for school purposes until he has collected them. The general principle is frequently stated that *mandamus* will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application. Until the time arrives when the duty should be performed, there is no default of duty; and mere threats not to perform the duty will not take the place of default. The writ is not granted to take effect prospectively. Spelling, Extraordinary Relief, § 1385; High, Extr. Leg. Rem. (3d ed.), §§ 12, 36; Tapping, Mandamus, 10; Wood, Mandamus (2d ed.), 51; 14 Am. & Eng. Ency. of Law (1st ed.), 105. The great weight of decision and textbook authority supports this very reasonable rule. The evils which would result from a practice which allowed courts to step in at any time by *mandamus* and direct the future action of a public officer on the assumption that he will disregard his legal duty are so patent that they do not need to be enlarged upon. The case of *Att'y Gen. v. Boston*, 123 Mass. 460, is cited and relied upon as authority for the issuance of the writ to control prospective action, and such in fact it seems to be. The case is, however, peculiar in its facts, and we are not inclined to regard it as of sufficient weight to justify departure from the general rule. Extreme cases may, perhaps, arise demanding the use of *mandamus* to control the performance of prospective duties; but this is certainly not such a case.

The appellant complains because upon the overruling of the demurrer and motion to quash judgment was immediately entered without notice and without leave being given to make a return. In the view we have taken of the case the objection becomes immaterial, but it seems proper to observe that we see no good reason why the usual practice of allowing a return to be made upon terms after the overruling of a demurrer should not have been followed.

By the Court.— Judgment reversed, and action remanded with directions to sustain the motion to quash the alternative writ.

STERN, Respondent, vs. RICHES, Appellant.

September 27 — October 15, 1900.

Replevin: Superior right of third person: Chattel mortgage.

A constable seized under a writ of attachment a stock of goods upon which there was a chattel mortgage. Subsequent to the levy the mortgagor claimed her exemptions, which were selected but delivery thereof was refused. Thereafter the mortgagee demanded possession of the property under the mortgage. Before the latter had changed her attitude the mortgagor brought replevin against the constable for the goods selected as exempt. *Held*, that the plaintiff could not recover, since the defendant established the superior right of a third person to the goods at the time of the commencement of the action, and connected himself with such person.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Action to recover possession of personal property. Plaintiff, being the owner of a stock of merchandise and store fixtures located in a grocery store kept by her, mortgaged the same to Gertie Stern and the mortgage was duly filed. The mortgage contained the usual provision empowering the mortgagee to take possession of the property if at any time

she deemed herself insecure. While the mortgage was in force defendant, as constable, pursuant to a writ of attachment duly issued and placed in his hands as constable to be executed, seized and took said property into his possession. Subsequent to the levy plaintiff, acting through her duly authorized agent, informed defendant that she claimed $200 in value of the property as exempt from seizure on attachment under the statute on the subject of exempt property, and requested an appraisal of the goods under the statute in order that she might choose her exemptions. Defendant recognized plaintiff's right to the extent of having an appraisal made, and she selected her exemptions and demanded delivery of the same to her, which was refused. Subsequently the mortgagee, by a duly authorized agent, demanded of defendant possession of the property pursuant to the terms of her mortgage. Thereafter, and without the mortgagee changing her attitude in respect to the property, this action in replevin was commenced by plaintiff to recover the property chosen by her as exempt from attachment. Certain issues of fact were submitted to the jury for decision, and the case, with the verdict rendered, was submitted to the court for findings of fact and conclusions of law. Such submission made the trial substantially a trial by the court. The facts found were as above stated. Judgment was rendered for plaintiff.

For the appellant there was a brief by *A. F. Rock* and *Ross, Dwyer & Hile*, and oral argument by *Mr. Rock*.

For the respondent the cause was submitted on the brief of *Victor Linley*.

MARSHALL, J. This case is ruled by two very familiar principles, viz.: In an action of replevin the plaintiff's right to recover must be tested by the facts existing at the time of the commencement of the action. The defendant may defeat the plaintiff's claim by proving right of possession of

the property in dispute at the time of the commencement of the action in a third person and connecting himself with such third person. Conceding that appellant should have delivered the property in question to respondent as exempt from attachment, it stands without dispute that this action was not commenced till the mortgagee demanded possession of such property and perfected her cause of action to recover the same from appellant. Now, as the right of the mortgagee was superior to that of respondent upon her choosing to assert the same, when she perfected her right to maintain an action to recover the property of appellant, that necessarily superseded the claim of respondent to the property. Appellant, by proving the superior right of the mortgagee and the demand by her for possession of the property, clearly established right to the possession thereof in a third person not before the court and connected himself with such third person, and judgment should have been rendered in his favor accordingly. *Timp v. Dockham*, 32 Wis. 146; Wells, Replevin, §§ 689, 692.

By the Court.— The judgment of the superior court is reversed, and the cause remanded with directions to render judgment in favor of defendant.

STERN, Respondent, vs. RICHES, Appellant.

September 27 — October 15, 1901.

Attachment: Levy: Exemptions: Replevin: Single action.

1. Where an officer levies upon property exempt by plain provisions of the statute he commits an actionable wrong in respect thereto as soon as he deprives the debtor thereof.
2. Under secs. 2982, 2982*a*, Stats. 1898, an officer holding a writ of attachment may levy upon an entire stock of goods belonging to the defendant, subject to his exemptions, and retain possession thereof

for a reasonable length of time for the making of an inventory and appraisement and the selection of exemptions, but if he unreasonably deprives the defendant of an opportunity to make a selection of his exempt property, or refuses to recognize his right thereto upon the particular articles being designated and demanded, he becomes a trespasser *ab initio*.

8. An officer holding a writ of attachment levied at the same time upon a horse and wagon which were clearly exempt and upon a stock of merchandise from which the debtor was entitled to select certain exemptions. Although he caused an appraisal to be made and permitted the debtor to select such exemptions, he refused to deliver up the articles selected upon demand. The debtor thereupon commenced an action to recover them, and the next day commenced an independent action to recover the horse and wagon. *Held*, that the debtor's right to recover all the exempt property was single and that but one action therefor could be maintained.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action of replevin. Defendant pleaded a former recovery for the alleged wrong. The following facts were established by the evidence: December 26, 1900, plaintiff was the owner and in possession of a horse and other personal property sought to be recovered in this action, and also a stock of merchandise and store fixtures located in a grocery store kept by her. All the property mentioned was at the same time levied upon by defendant as constable and taken into his possession under a writ of attachment against plaintiff's property. Thereafter plaintiff requested defendant to cause an inventory and appraisement of the store goods and fixtures to be made pursuant to the statute, in order that she might select her exemptions. An inventory and appraisement were made accordingly, whereupon plaintiff selected $200 in value of the property according to the appraisal, made a list thereof, and demanded possession of the same of defendant. The demand was refused. On January 2d thereafter, plaintiff commenced an action of replevin in the municipal court of Douglas county to recover the property so

demanded. The next day, in the same court, this action was commenced to recover the horse and other property mentioned. Such proceedings were had in the first action that plaintiff recovered judgment. Thereafter this action was brought up for trial and the first recovery was pleaded as a bar to its prosecution. Judgment was rendered in favor of defendant. The cause was thereafter removed by appeal to the circuit court for Douglas county, where it was tried and upon proof of the facts before stated a verdict was directed in favor of defendant, upon which judgment was rendered.

For the appellant there was a brief by *Victor Linley*, and oral argument by *C. H. Crownhart.*

For the respondent there was a brief by *A. T. Rock* and *Ross, Dwyer & Hile*, and oral argument by *Mr. Rock.* They argued, among other things, that but one action should have been brought to recover both lots of alleged exemptions, and that the judgment rendered and entered in the first action is a bar to this action. *Dick v. Webster*, 6 Wis. 481; *Borngesser v. Harrison*, 12 Wis. 544; *Kaehler v. Dobberpuhl*, 60 Wis. 256; *Bowe v. Minn. M. Co.* 44 Minn. 460; *O'Neal v. Brown*, 21 Ala. 482; *Marble v. Keyes*, 9 Gray, 221; *Folsom v. Clemence*, 119 Mass. 473; *Farrington v. Payne*, 15 Johns. 432; *Brannenburg v. I., P. & C. R. Co.* 13 Ind. 103; *Binicker v. H. & St. J. R. Co.* 83 Mo. 660; *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297; *Funk v. Funk*, 35 Mo. App. 246; *Cracraft v. Cochran*, 16 Iowa, 301; *Secor v. Sturgis*, 16 N. Y. 548; *Barnard v. Devine*, 34 Misc. (N. Y.), 182, and cases cited; *Perry v. Dickerson*, 85 N. Y. 347.

MARSHALL, J. There can be but one action to redress a single wrong. The law does not permit a person to indulge in useless and vexatious litigation by splitting up a cause of action and prosecuting several suits of the same or different natures. No principle is better settled than that. The

learned trial court decided that the levy upon the property sought to be recovered in this action, and that upon the property involved in the first action of replevin, were a single act and an inseparable wrong, giving rise to but one cause of action; and that the commencement of the first action precluded maintenance of the second.

Appellant does not contend but that the general rule is that, where one wrongfully deprives another of several articles of personal property by a single act, but one cause of action thereby accrues to such other; and that, while he may have an election of remedies, when he makes his election he must pursue his remedy by a single action. That is the settled law as may be seen by reference to the following: *Farrington v. Payne*, 15 Johns. 432; *Herriter v. Porter*, 23 Cal. 385; *Draper v. Stouvenel*, 38 N. Y. 219; *Marble v. Keyes*, 9 Gray, 221; *Barnard v. Devine*, 34 Misc. (N. Y.), 182; *Reilly v. Sicilian A. P. Co.* 31 App. Div. 302; *Funk v. Funk*, 35 Mo. App. 246; *Bennett v. Hood*, 1 Allen, 47; *Trask v. H. & N. H. R. Co.* 2 Allen, 331; *McCaffrey v. Carter*, 125 Mass. 330; *Sullivan v. Baxter*, 150 Mass. 261; *Folsom v. Clemence*, 119 Mass. 473. The rule has been strictly enforced by courts as the following clearly indicates. In *Folsom v. Clemence* the plaintiff inadvertently omitted several articles of property in bringing his first action. Nevertheless the court held that the judgment in such action was a bar to the prosecution of an action to recover such omitted articles. In *Sullivan v. Baxter* there was the same ruling. In *McCaffrey v. Carter* it was held that even where part of the articles wrongfully withheld from plaintiff by the defendant were omitted from the first action through the fraud of the latter a second action could not be maintained. That is an extreme application of the rule,— one that could not be followed without hesitation and careful consideration. Many cases hold that the judgment in the first action is a bar to a second action only so far as the plaintiff knew or

ought to have known of the facts in time to have included the omitted articles in such first action. *Moran v. Plankinton*, 64 Mo. 337; *Farrington v. Payne*, *supra*. *Marble v. Keyes*, *supra*, was in many respects like this case. An officer, under a writ of attachment, levied upon a stock of goods and upon a harness and wagon which were located in a barn a quarter of a mile from the store where the goods were situated. An action was commenced which proceeded to judgment for the store goods, and that was held to be a bar to an action to recover the harness and wagon.

Applying the foregoing to the facts of this case, there can be no doubt that the claim of appellant to all the property taken by respondent under the writ of attachment was single and enforceable in one action, unless it was separable because the wrong, as to the store goods, was not complete till respondent refused to deliver the same after the appraisement of the stock, the designation by appellant of the articles claimed by her, and the refusal to comply with her demand for possession thereof. While she testified that the property involved in this action was located some distance from the store, and that she did not know it was taken by the officer till some days after she received knowledge that the other property had been taken, she knew all the facts when the first action was commenced and so cannot defend her failure to include all the property therein by the plea of ignorance, if we were to hold that want of knowledge of the facts would constitute an excuse for such failure, as held in some of the cases cited.

The right of plaintiff to her horse and the property other than the store goods and fixtures did not depend upon any act upon her part in selecting the same out of a quantity of property of the same character. She had no other property of the same nature. It was exempt by plain provisions of the statutes, hence respondent committed an actionable wrong in respect thereto as soon as he deprived appellant

thereof. *Gilman v. Williams*, 7 Wis. 329; *Cole v. Green*, 21 Ill. 104; *Savage v. Davis*, 134 Mass. 401. But the law in respect to the exemption of property from attachment, of the character of that involved in the first action (subd. 8, sec. 2982, Stats. 1898), clearly contemplates that an officer holding a writ of attachment may levy upon an entire stock of goods belonging to the defendant, subject to his exemptions, and retain possession thereof for a reasonable length of time to enable such officer to make an inventory and appraisement thereof and to permit the defendant to select and claim and receive a return of the exempt property; and that, if the exemption right is not asserted within a reasonable time, it will be deemed waived. Sec. 2982*a*, Stats. 1898, provides that, "Whenever personal property shall be seized on attachment or execution and any part thereof shall be exempt from such seizure under any provision of law exempting to the debtor property of like kind to a specific amount in value and such exemption shall be claimed on the part of the debtor or his wife the officer making such seizure shall, upon request by either of them, or may upon his own motion, cause said exempt property to be appraised, . . . for the purpose of such exemption." Under similar statutes elsewhere it has been held that the officer, by merely levying upon property, does not become a trespasser; that he has a right to take such possession thereof as is necessary to enable him to make an inventory and appraisal of the same. *Bonnel v. Dunn*, 29 N. J. Law, 435; *Town v. Elmore*, 38 Mich. 305; *Vanderhorst v. Bacon*, 38 Mich. 669.

Our statute, as held in the last case cited, clearly makes it the duty of the officer to inventory the property at the place where it is levied upon, if seasonably demanded by the defendant, and makes such inventory and the required appraisement of the property, and subsequent recognition of the rights of the defendant to the articles selected as exempt, essential to the validity of the levy. If the officer

unreasonably deprives the defendant of an opportunity to make a selection of his exempt property, or refuses to recognize the right to the exempt property upon the particular articles claimed being designated and demanded, he is guilty of such an abuse of process as to render him a trespasser *ab initio*. He has no right to take the exempt property at all, except subject to the right of exemption, and if he disregards such right by refusing to make the inventory and appraisal required by statute when requested by the defendant, or refusing to set aside and deliver to the defendant, upon demand therefor, the articles selected as exempt, evincing that the levy was not made subject to but in defiance of the exemption right, he is guilty of an abuse of process and is a trespasser *ab initio*. Sec. 2982, Stats. 1898, provides, as to property exempt under subd. 8 as well as under every other subdivision of the section, that it is not liable to seizure on attachment or execution. Looking at that with sec. 2982*a*, it is evident that a seizure of property under subd. 8 is not a completed wrong till the invasion of the owner's right of exemption is complete, and that then the wrong dates from the first interference with the property. Our statute was taken from Michigan with the construction above indicated. It differs from the Michigan statute in that it does not require the officer making an attachment upon property, under circumstances such as existed in this case, to cause an inventory and appraisement thereof to be made and to give to the defendant the full benefit of the exemption right whether he demands it or not. But the two statutes seem identical as to requiring that the defendant shall have reasonable opportunity to exercise the exemption right; that when exercised it shall be respected; and that a levy in defiance of such right is illegal.

From what has been said we reach the conclusion that the conduct of respondent prior to the commencement of the first action of replevin rendered him a wrongdoer as to

the property involved in that action from the time of the taking thereof and that the same wrong included taking the property involved in this action. That is in accordance with the decision of the trial court and requires an affirmance of the judgment appealed from.

By the Court.— The judgment appealed from is affirmed.

BEAN, by guardian *ad litem*, Respondent, vs. PERCIVAL COPPER MINING COMPANY, Appellant.

September 27 — October 15, 1901.

Contracts: Pleading: Variance.

In an action to recover for personal services alleged to have been performed for defendant, at its special instance and request, at an agreed price per day, plaintiff offered in evidence a contract by which third persons agreed to do certain work for defendant and the latter agreed to pay all laborers employed by them. *Held*, that it was error to admit such evidence without amendment of the complaint and giving defendant an opportunity to say whether it was prepared to go on with the trial under the changed conditions.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The plaintiff brought this action to recover for personal services, alleging that between September 1, 1899, and January 1, 1900, he performed work, labor, and services for the defendant, at its special instance and request, for a period of eighty-one and one-half days, at the agreed wages of $2 per day. The defendant answered, alleging that the services mentioned were performed for Frank E. Bean, A. L. McDonald, Fred W. Bean, and Harry M. Bean, and that long prior to the commencement of this suit said parties had

paid him in full. The proof fails to show that plaintiff had any contract with defendant, or that he performed any work for them. To support his cause of action, the plaintiff introduced in evidence a written contract between the defendant and the parties above named, in which the latter agreed to sink a shaft on premises described, of certain designated dimensions and depth, to be paid for at the rate of $18 per foot. In this contract was the following clause: "The first party to pay on the 15th of each month all laborers employed by the second parties for work done the previous month." The defendant objected to the admission of the contract on the ground that it was not admissible under the pleadings, etc. The court overruled the objection. Other items of testimony tending to establish an entirely different cause of action than that sued upon were admitted over defendant's objection. At the close of the testimony the defendant moved to strike out all of the testimony so objected to, and for a direction of a verdict for defendant on the ground of a failure of proof to establish the plaintiff's cause of action. Both motions were denied, the court remarking that, if there was a variance of proof, the complaint would be deemed to be amended to correspond to the proof. Defendant duly excepted. The court instructed the jury that, if plaintiff was working for the parties named in the answer, and relied upon the promise made by defendant in the contract, the jury should find for the plaintiff for the number of days he worked after the contract went into effect. Defendant took due exception. The jury found for plaintiff. A motion for a new trial was overruled, and judgment entered for plaintiff, from which defendant has appealed.

For the appellant there was a brief by *Arnold & Arnold*, and oral argument by *N. B. Arnold.*

For the respondent the cause was submitted on the brief of *W. P. Crawford.*

BARDEEN, J. The plaintiff sued on a cause of action for work, labor, and services performed for the defendant at an agreed price per day. He was allowed to prove an entirely different cause of action, against defendant's constant objection. The contract offered in evidence was clearly inadmissible. It was distinctly error to admit it under the pleadings as they then stood. No doubt the court might have allowed an amendment of the complaint when the evidence was offered, and proceeded with the trial, if the defendant made no showing of surprise. No application for amendment was made, and, of course, no opportunity was given defendant to say whether it was prepared to continue the trial and to meet and combat the changed conditions. Indeed, not until the court charged the jury was the defendant really advised as to the position the court would take with reference to the defendant's liability under the proof. It was not a mere question of variance of proof. It was the substitution of a new and different cause of action, based upon a state of facts entirely different from those stated in the complaint. There was absolutely no proof to support the allegations of the complaint. When the defendant was given to understand the real attitude of the court, it was too late to urge surprise, or to do anything except protest as it did. The rules of law governing such matters are plain and well settled, and we cannot sanction such an unwarranted departure therefrom.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

THE STATE EX REL. BANK OF COMMERCE, Respondent, vs. BELL, County Treasurer, Appellant.

September 28 — October 15, 1901.

Taxation: Judgment against town: Delinquent tax belongs to county: Remedy of judgment creditor.

1. A tax levied to pay a judgment against a town is a tax in the ordinary sense of the term and not a special assessment, and no individual liability to the judgment creditor on the part of the taxpayer is created thereby. Such a tax is therefore within the provision of sec. 1114, Stats. 1898, that taxes returned as delinquent shall belong to the county and be collected for its use; and the judgment creditor cannot compel the payment to him of any portion of the delinquent taxes collected by the county treasurer.
2. All sums received by a town treasurer upon the levy of county taxes and retained by him in place of the returned delinquent town taxes are collected by him upon the latter.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

In the 1899 tax roll of the town of Superior was included, in separate column, a tax for the payment of judgments to the amount of $12,973.72, inclusive of a judgment in favor of the relator for $2,162.46, of which transcript had been duly filed with the town clerk. The county taxes in the same tax roll amounted to $7,896.02. At the time of making return to the county treasurer by the town treasurer there remained delinquent, and were returned as such, only $7,724.51, exclusive of five per cent. collection fee. The relation asserts that this included $1,723.35 of the above-mentioned levies to pay judgments; that the county treasurer has since collected $4,777.95 of delinquent taxes, whereof $1,016.77 is collected upon said judgment levy, relator's proportionate share of which is $267.91; that relator has received from the town treasurer only $1,427.22, leaving still due and unpaid to him $735.25. Upon this relation an alternative writ was issued, commanding the

county treasurer to pay over to the relator all moneys collected by him on the delinquent judgment tax on said tax roll belonging to the *Bank of Commerce*, to wit, $267.92. The treasurer made a return asserting some of the foregoing facts, which are not included in the petition; whereupon, apparently, the petition was by stipulation amended in that respect, and an issue of law was then joined by a motion to quash the alternative writ. As a result, judgment was rendered in favor of the relator, and a peremptory writ issued, commanding the respondent below, as county treasurer, to pay to the relator said sum of $267.92, from which judgment the respondent below appeals.

C. H. Crownhart, for the appellant.

For the respondent the cause was submitted on the brief of *Reed & Reed*. They contended, *inter alia*, that this judgment tax was a fund provided by law for judgment creditors; it belonged to them, and no change in collectors of that fund or in the system of making the collection could change the character of the fund or the rights of the parties to whom it belonged. *Wis. Cent. R. Co. v. U. S.* 164 U. S. 190, 212; *State ex rel. School Directors v. Nelson*, 105 Wis. 111; sec. 781, Stats. 1898; Merrill, Mandamus, 170; *Brown v. Crego*, 32 Iowa, 498; *State ex rel. Mills v. Kispert*, 21 Wis. 387; *State ex rel. Soutter v. Madison*, 15 Wis. 30; *State ex rel. Donnelly v. Hobe*, 106 Wis. 411.

DODGE, J. There are two sufficient reasons why the county treasurer should not be commanded by *mandamus* to pay to relator the moneys collected by him upon the delinquent taxes returned by the town of Superior: first, because such taxes belonged to the county; second, because the town has already collected the whole of the taxes levied to pay judgments, and relator's rights are against the money in the possession of the town or its officers.

The first proposition results inevitably from the distinc-

tions pointed out and the arguments stated as supporting the decision of this court in *State ex rel. Donnelly v. Hobe*, 106 Wis. 411. It was there recognized and declared that sec. 1114, Stats. 1898, which commands that "all taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use," must control all *taxes* but that the word as used in that section did not include special assessments, which, although imposed under the power of taxation, are not taxes in the sense that other imposts levied for town or municipal purposes are. Special assessments were distinguished, in that they are specific liens upon definite parcels of property and belong to an individual. They are, in substance, indebtedness owing by such property or its proprietor to the owner of the special assessment certificate, to which neither town nor county has any relation save as a collecting agent, constituted such by law. Further, they were distinguished in that they represent burdens on property, not for a municipal expense distributed generally over the taxable property, but a liability for special service to the particular property charged therefor.

A tax to pay a judgment has none of the distinguishing characteristics of the special assessment, except, perhaps, that no legislative action by the town board is required for its levy. That, however, is an immaterial circumstance. The law itself makes the levy upon the establishment of the necessary data by the filing of the required transcript and affidavit. On the contrary, we do find all the elements of a tax as defined in the *Hobe Case*. It is imposed on all taxable property generally and ratably; it is for a municipal purpose; it goes to discharge a liability of the town, and not a liability specifically owed by the individual taxpayer. The doctrine, hinted at by respondent, that the extension of a tax to pay a judgment creates personal ownership by the judgment creditor of the individual liability of each tax-

payer, has no foundation. Until the judgment is paid in full, the town is the debtor, and no debt or liability to the creditor rests upon any individual. There is no circumstance which can exclude this levy for payment of the town judgments from the words "all taxes," which, by the clear and unambiguous command of sec. 1114, shall belong to the county, and be collected for its use, when returned delinquent. They do not then belong to the judgment creditor, nor are they collected for his use, and he cannot compel payment to him of the amounts received by the county.

2. As a corollary of the conclusion that the delinquent taxes become the property of the county, it follows that all sums received by the town treasurer upon the levy of county taxes, and retained by him in place of the returned delinquent town taxes, are collected by him upon the latter. In the present case it appears that for every dollar of town taxes levied, including the judgment tax, money has been received into the town treasury. To that treasury or its custodian the relator should apply. Why he does not is unexplained, but, whatever the reason, it cannot serve to transfer to the county the liability resting upon the town.

Counsel for respondent urges upon us the possibility, in case delinquent taxes exceed total county levy, of confusion of different town funds and complications in carrying out both the provisions of sec. 781, Stats. 1898, which provides for payment of judgments out of the tax levied therefor, and of sec. 837, which prescribes priority to certain funds. It cannot be denied that there is room for serious complications among statutes, some giving priorities to certain funds, and others permitting moneys paid for one purpose to be used to supply deficits in the funds for other purposes. Those complications must be met when they are unavoidable, but none of them is presented in this case, where the town treasurer has collected and received the full amount required to satisfy all the funds.

From the foregoing views it is obvious that the circuit court erred in issuing the peremptory writ of *mandamus* against the county treasurer. On the relation as amended and the issue of law joined thereon he should have quashed the alternative writ.

By the Court.— Judgment reversed, and cause remanded with directions to enter judgment quashing the alternative writ of *mandamus*.

GLASCOTT, Respondent, vs. BRAGG, Administrator, and another, Appellants.

111 605
s56 LRA 258
56 LRA 754n

October 15 — November 5, 1901.

Wills: Implied revocation: Marriage and adoption of child.

1. Under sec. 2290, Stats. 1898 (relating to revocation of wills and providing that nothing therein contained "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator"), marriage of the testator and birth of a child operate to revoke a will made prior to such marriage and not in contemplation thereof.
2. Under sec. 4024, Stats. 1898 (providing that a duly adopted child "shall be deemed, for the purposes of inheritance and succession by such child . . . the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption"), adoption of a child is equivalent to birth of a child in its effect upon a will made prior to the marriage of the adopting parents.

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

For the appellants there were briefs by *J. D. Dunwiddie* and *Jones & Stevens*, and oral argument by *Mr. Dunwiddie* and *Mr. B. W. Jones*.

For the respondent there were separate briefs by *W. A. Corson*, attorney, and *William G. Wheeler*, of counsel, and

oral argument by *Mr. Wheeler*. To the point that adoption does not, like the subsequent birth of a child, revoke the former will of the person adopting, they cited *Davis v. Fogle*, 124 Ind. 41; *In re Gregory's Estate*, 15 Misc. (N. Y.), 407, 13 Misc. (N. Y.), 363; *In re Comassi's Estate*, 107 Cal. 1.

CASSODAY, C. J. It appears from the record, in effect, that January 31, 1870, the deceased, Archibald F. Glascott, when a single man, made a will whereby he purported to give all his property to his brother, *David S. Glascott*, the respondent in this action; that January 11, 1875, the testator married Alice A. Bragg; that June 20, 1881, the testator and his wife duly adopted an infant son of Mary J. Morgan, whose husband had a short time before died; that said infant son was then less than four years of age, and by and upon his adoption his name was changed to *William M. Glascott;* that September 29, 1888, the testator's said wife died; that the testator remained unmarried from the time of the death of his wife, Alice A., until he died himself, April 21, 1899; that he never had any child other than his adopted son, *William M. Glascott;* that at the time of his death he left personal property of the probable value of $7,200, and real estate of the probable value of $3,500, and liabilities of the probable amount of $5,900; that after the death of his wife the testator caused the insurance on his life which had been payable to her, of $2,000, to be transferred to his brother *David S.*, and his sister Mary Glascott, and the amount thereof was paid to them after his death; that during his life the testator also procured and maintained other insurance on his life in the sum of $3,000, payable to his adopted son, *William M. Glascott*, and which since his death has been paid to him; that January 10, 1900, the county court of Green county, after due hearing, refused to admit said will to probate; that thereupon the said *David S. Glascott* appealed from that judgment to the cir-

cuit court for Green county, whereupon the cause was retried, and at the close of the trial judgment was entered admitting the said will to probate, with costs. From that judgment the defendant *William P. Bragg*, as administrator, and the defendant *William M. Glascott*, bring this appeal.

The statute of this state prohibits the revocation of a will, "unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it," or by the execution of some other will, codicil, or other writing as therein prescribed, "excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Sec. 2290, Stats. 1898. "Revocation implied by law," thus excepted out from the operation of the prohibitory clause of this section, manifestly means such as had previously been implied at common law. *Will of Ward*, 70 Wis. 255. There can be no doubt but that, at common law, the marriage of a man, and issue of such marriage, operated to revoke his will previously made, disposing of all his property, as here. *Christopher v. Christopher*, 2 Dickens, 445; *S. C.* 4 Burrow, 2182, and note; *Spraage v. Stone*, 2 Amb. 721; *Brady v. Cubitt*, 1 Doug. 31; *Lancashire v. Lancashire*, 5 Term, 49, 58; *Marston v. Fox*, 8 Adol. & E. 14, 55; *Israell v. Rodon*, 2 Moore, P. C. 51. The earlier cases seemed to go upon the theory that such marriage and birth raised a mere presumption of an intent to revoke, but the rule held in the later cases was finally confirmed in the Privy Council in the last case cited, where it was expressly held that "marriage and birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an absolute revocation of a will made previous to the marriage but not in contemplation of it; the rule being that there is a tacit condition annexed to the will that at the time of making it it should not have effect provided the deceased have a wife, and child subsequently born." Mr. Schouler adopts the same

view, and declares that "the common-law tribunals . . . solemnly decided that the principle was one of legal inference, independently altogether of what the party himself might have intended." Schouler, Wills (2d ed.), § 425. See, also, *Baldwin v. Spriggs*, 65 Md. 373.

It follows from what has been said that, had *William M. Glascott* been the child of the deceased, Archibald Glascott, and his wife, Alice A., by birth instead of adoption, then such marriage and birth would have worked a complete revocation of the will. The question recurs whether under our statute such adoption is equivalent to such birth, for the purpose of implying such revocation. It is conceded that the child was adopted as prescribed by the statutes. Secs. 4021–4024, ch. 173, Stats. 1898. The last section of that chapter declares the effect of such adoption, as follows: "A child so adopted *shall be deemed*, for the purposes *of inheritance and succession* by such child, custody of the person and right to obedience by such parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption, *excepting* that such child shall not be capable of taking property *expressly limited* to the heirs of the body of such parents." Sec. 4024. The language and meaning of this provision of the statute seem to be as explicit as words can make them. "For the purposes of inheritance and succession by such child" he was to be deemed in law as if he "had been *born in lawful wedlock* of such parents by adoption." "In law," the word "inheritance" is defined to be "the estate cast upon the heir by law immediately on the death of the ancestor; in a more general sense, any property passing by death to those entitled to succeed." Cent. Dict. "That which is or is to be inherited. . . . Whatever is transmitted by descent or succession." Standard Dict. The word succession is defined to be: "The act or right of legal

or official investment with a predecessor's office, dignity, *possessions*, or functions; also the legal or actual order of so succeeding, or that which is or is to be vested or taken." Standard and Century Dictionaries. The statute quoted goes further, and declares that the "custody of the person and right to obedience by such parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children," "shall be deemed" in law to be "the same to all intents and purposes as if the child had been *born in lawful wedlock* of such parents by adoption." To emphasize such declaration, the remainder of the section deprives the natural parents "of all legal rights whatsoever respecting such child," and frees the child "from all legal obligations of maintenance and obedience to such natural parents." As to the matters covered by the statute, its obvious purpose is that such child shall be deemed in law as if "born in lawful wedlock of such parents by adoption," "excepting that such child shall not be capable of taking property expressly limited to the heirs of the body of such parents." "It is a universal rule of construction, founded in the clearest reason," said BLACK, C. J., "that general words in an instrument or statute are strengthened by exceptions and weakened by enumerations." *Sharpless v. Philadelphia*, 21 Pa. St. 161; *Webster v. Morris*, 66 Wis. 395; *Chicago, M. & St. P. R. Co. v. Hoyt*, 89 Wis. 324. The exception in this statute has that effect.

The cases cited by counsel in support of the judgment of the trial court, from New York, Indiana, and California, were each under statutes widely and radically different from our statute in question, and, of course, they are not authority in the case at bar. In a recent case in Iowa those cases are considered, and the difference in the statutes of that state and those other states referred to, and it was held that "the adoption of a child by a testator operated as a revocation of a previously executed will." *Hilpire v. Claude*, 109

Iowa, 159. The statute of Iowa is much more like our own than the statute of any of the other states mentioned, but it is not as strongly in favor of the adopted child as our own. Being a matter of statute, significance must be given to the language of the statute. This court has held that such statutes are to "be liberally construed in favor of children." *Parsons v. Parsons*, 101 Wis. 76. In a case of voluntary settlement, it was held in Massachusetts, under a statute similar to ours, that the adopted child took under the settlement, the same as if he had been born to the adopting parents in natural wedlock. *Sewall v. Roberts*, 115 Mass. 262. So in that state it has been held that "a child by adoption is 'issue,' within the meaning of" their statute, "which provides that if the husband dies intestate leaving 'no issue living' his widow shall take his real estate in fee to an amount not exceeding $5,000 in value." See, also, *Burrage v. Briggs*, 120 Mass. 103.

We must hold that the marriage of the testator and the adoption of the child operated to revoke the will previously made.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to affirm the judgment of the county court, and for further proceedings according to law.

On December 17, 1901, an order was made allowing to respondent taxable costs out of the estate.

BARLASS, Appellant, vs. KARGUS and another, Respondents.

October 16 — November 5, 1901.

Trial: Findings: Nonsuit: Evidence: Appeal: Bill of exceptions: Immaterial errors.

1. Findings of fact should always be made in an action tried by the court.
2. In an action tried by the court the granting of a nonsuit without making findings of fact cannot work a reversal of the judgment where it was consented to by both parties in the trial court and is not assigned as error on the appeal.
3. Where evidence received "subject to objection" in an action tried by the court is included in the bill of exceptions it is before the appellate court for all purposes, and the failure to receive it absolutely cannot be ground for reversal.
4. Refusal of the trial court to allow plaintiff to introduce additional evidence after a motion for nonsuit was made will not be held error unless it was an abuse of discretion.
5. After a cause before the supreme court has been placed upon the assignment for argument, leave will not be granted to withdraw the record and return it to the trial court for the purpose of obtaining a certificate that the bill of exceptions contains all the evidence.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an action of replevin to recover a large quantity of farm machinery, horses, and cattle. Trial by jury was waived, and the action was tried by the court. The plaintiff claimed ownership of the property by virtue of a chattel mortgage executed by the defendants May 6, 1898. The mortgage was introduced in evidence, and was objected to by the defendants on the ground that the plaintiff's complaint alleged absolute ownership of the property, and that it was incompetent for the plaintiff, under such an allegation, to show his special property therein as chattel mortgagee. The mortgage was received subject to the objection. At the close of the plaintiff's evidence, the defendants moved

for a nonsuit, claiming that the evidence showed that the mortgage had been satisfied by the application thereon of payments, and, further, that the plaintiff could not recover because there was no proof of any demand made before the action was brought. The motion for nonsuit was granted, and judgment was entered dismissing the action and ordering the return of the property or its value, and from this judgment the plaintiff appeals.

M. P. Richardson, for the appellant.

John Cunningham, for the respondent *Frank Kargus*.

For the respondent *Minnie Kargus* there was a brief by *Smith & Pierce*, and oral argument by *C. E. Pierce*.

WINSLOW, J. Although this action was tried by the court, a nonsuit was granted at the close of the plaintiff's case, and no findings of fact were made. This was contrary to the statute. Stats. 1898, sec. 2863. Findings of fact should always be made in an action tried by the court, whether the action be legal or equitable. *Yahr v. Joint School Dist.* 99 Wis. 281. This method of disposing of the case, however, seems to have been consented to by both parties in the court below, and no error is assigned upon it in this court; hence it cannot be considered as a ground which would entitle the appellant to a reversal, but is referred to now simply to call attention to the correct practice in such cases.

The chattel mortgage upon which the plaintiff based his claim of title was received in evidence *subject to objection*, and appellant claims that it was error not to receive the same absolutely and without qualification. The mortgage is in the bill of exceptions, and hence is before us for all purposes. No prejudice of any kind results from the fact that it was received subject to objection; hence, whether the ruling was right or wrong, it can be no ground of reversal.

After the motion for nonsuit was made, the appellant applied to the court for leave to introduce additional evidence on the subject of the payments upon the mortgage, and the application was denied. This ruling is now claimed to have been error. The matter was in the discretion of the trial court, and its action will not be reversed unless there has been an abuse of such discretion. No facts are shown which would justify us in holding that there was an abuse of discretion in making the ruling; hence there is no error.

Lastly, it is claimed that the nonsuit should not have been granted because the evidence shows the mortgage to be a valid lien, and that it has not been paid. The bill of exceptions, however, is not certified to contain all of the evidence, and hence, under the rule which is frequently applied, it must be presumed that there was sufficient evidence of a conclusive nature before the trial court to justify its conclusion. Application was made after the argument by the appellant for leave to withdraw the record and return the same to the trial court for the purpose of obtaining the proper certificate. Such leave was, however, denied. We have found it necessary to adhere closely to the rule that the record must be complete when a case is placed upon the assignment for argument.

By the Court.— Judgment affirmed.

LUBY, Respondent, vs. BENNETT, Appellant.

111 613
59 LRA 504

October 15 — November 5, 1901.

Malicious prosecution: Termination of wrongful action: Pleading: Interference with person or property essential: Partnership: Damages.

1. A right of action for malicious prosecution will not accrue to a person till the wrongful action against him shall have proceeded to a final determination in his favor.

2. If a complaint, in an action to recover damages for a malicious prosecution, does not state that the wrongful action has been terminated in favor of the plaintiff, it will be open to demurrer for insufficiency.
3. It is not essential to the maintenance of an action for damages for a malicious prosecution that all the proceedings in such prosecution, proper to be had therein, took place before such action was commenced; it is sufficient if, before the commencement of such action, the issues material to the *bona fides* of the alleged malicious prosecution were decided and closed in favor of the defendant therein by a final judgment.
4. A judgment in an action which is subject to appeal to a higher tribunal than the one in which it was rendered, is nevertheless final for the purpose of an action to recover damages for the malicious prosecution thereof.
5. It is not necessary to allege in a complaint, in an action to recover damages for malicious prosecution, that judgment has been rendered in the wrongful action in favor of the defendant therein and that such judgment has not been appealed from or reversed; it is sufficient to allege that judgment has been rendered in the wrongful action in favor of the defendant therein. Subsequent proceedings in such action, impairing the effect of such judgment as a foundation for an action for malicious prosecution, if not disclosed by the complaint, can only be taken advantage of by the defendant as defensive matter.
6. The general rule which prevails in England, and has the greater support of judicial and elementary authority in this country, is that a civil action, maliciously prosecuted, where neither the person nor the property of the defendant is interfered with inflicting special damages to him, will not sustain an action for malicious prosecution.
7. An action to wind up a partnership on the ground of misconduct of the defendant partner, and the deprivation of such defendant, in such action, of his right to the possession and enjoyment of the partnership property, is not a civil action interfering with neither the person nor property of the defendant, within the general rule above stated. On the contrary, it belongs to that class of actions that will sustain an action for malicious prosecution because of the injury to the good name and fame of the defendant therein to an extent not remediable by a mere vindication of him upon the trial and a judgment for costs; moreover, it interferes with his property to all intents and purposes the same as an attachment thereof would, and in such a way that damages, other than those

incident to an ordinary civil action maliciously prosecuted, are presumed.

8. In an action for damages for a wrongful interference with personal or property rights, a specific allegation as to damages, specifying the amount thereof, is not essential to the plaintiff's cause of action to recover such damages as are necessarily inferable from the facts alleged.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Rock county: R. G. SIEBECKER, Judge. *Affirmed.*

Action to recover damages. The complaint stated the following as a cause of action: Plaintiff and defendant, from March 27 to November 6, 1897, were copartners in the shoe business in Janesville, Wisconsin. Plaintiff contributed to such business $4,400 in money and gave his personal attention thereto, which was reasonably worth $100 per month. The sales were $17,000, and there was a profit of thirty-three per cent. thereon, one half of which justly belonged to plaintiff. On the last day named defendant maliciously and without probable cause commenced an action in the circuit court for Rock county, Wisconsin, charging plaintiff, among other things, with having wrongfully taken from the assets of the firm, in goods and money, $2,000 to $2,500 and appropriated the same to his own use, and sold goods on credit without making any account thereof, intending to collect therefor and convert the proceeds to his exclusive benefit. The prayer was for a dissolution of the partnership and for a receiver. Without notice to this plaintiff, defendant procured the appointment of himself as receiver, and thereafter, pursuant thereto, took exclusive control of the firm property and business, and subsequently sold the same at a great sacrifice, secretly bidding the property in for his own benefit, whereby plaintiff's interest in the firm assets was wholly lost to him. The purpose of the action brought by defendant as stated was to accomplish the result before stated. By reason of the facts plaintiff was in-

jured in his good name, was caused much mental pain, was seriously prejudiced in his efforts to obtain profitable employment, and caused to expend upward of $1,500 in defending himself against the unjust action. Such proceedings were finally taken in such action that it was finally decided that the charges against plaintiff were false and malicious. Upon such facts plaintiff asked judgment in the sum of $10,000.

Defendant demurred to the complaint for insufficiency, and the demurrer was overruled.

The cause was submitted for the appellant on the brief of *Sutherland & Nolan*, and for the respondent on that of *Winans & Russell*.

MARSHALL, J. A right of action for damages for malicious prosecution does not accrue till the wrongful proceeding has been brought to final determination in favor of the defendant or person accused. *Pratt v. Page*, 18 Wis. 337; *Winn v. Peckham*, 42 Wis. 493, 499; *Woodworth v. Mills*, 61 Wis. 44; *Lawrence v. Cleary*, 88 Wis. 473; *Lowe v. Wartman*, 47 N. J. Law, 413; *Comm. v. McClusky*, 151 Mass. 488. Hence, as indicated in the authorities cited, in an action to recover compensation for such a wrong, such final determination must be distinctly alleged in the complaint and proved upon the trial, the same as any other fact essential to the cause of action, or the pleading will be open to successful challenge for insufficiency. Appellant now invokes that rule, but as we read the complaint it seems that it is very clearly alleged that the wrongful prosecution was ended by a judgment in favor of the defendant therein before this action was commenced. The meaning of the language of the pleading, "It was finally decided and adjudged in said action on the 25th day of September, 1900, that said action was without foundation and was maliciously and unjustly begun, and that this plaintiff was and had not

been guilty of any wrong, and awarded this plaintiff judgment therein against the plaintiff therein (the defendant in this action)," leaves no room for reasonable controversy but that the alleged wrongful prosecution was closed by a judgment in favor of respondent prior to the commencement of this suit. It is said that the receiver appointed had not made his report when this action was commenced, and that it indicates that the alleged wrongful prosecution was not ended. The rule invoked does not require that all proceedings that may be had or are required in an action to finally work out or enforce the rights of the parties shall occur before a cause of action will accrue to the defendant therein to prosecute the plaintiff for maliciously commencing and carrying on such action. It requires only that the issues material to the question of the *bona fides* of such action shall be tried and closed by final judgment. That was done in the case in question, notwithstanding the provisional remedy or ancillary proceeding therein, to control, administer, and preserve the property involved, to await the final determination of the rights of the parties, was not fully closed up.

It is suggested that the action cannot be said to have been finally closed when this action was commenced, because the right of appeal from the judgment to this court existed. There is authority to the effect that a judgment in favor of the defendant in the alleged wrongful action, appealed from to a higher court, does not satisfy the element of want of probable cause, and is insufficient to sustain a suit for malicious prosecution of such action. *Reynolds v. De Geer*, 13 Ill. App. 113; *Nebenzahl v. Townsend*, 61 How. Pr. 353. In the first of such cases the decision went upon the ground that the alleged wrongful prosecution was in a justice's court and that the appeal from the judgment opened up the whole matter, giving the plaintiff therein a right to a trial *de novo;* and in neither case was the question under discussion raised by an objection to the sufficiency of the com-

plaint, but the status of the alleged wrongful prosecution was treated as matter of defense. *Nebenzahl v. Townsend* is supported by numerous citations from English authorities to the effect that the plea of a pending appeal from the judgment in the first action is a good defense. In *Ingram v. Root*, 51 Hun, 238, it is said that it is essential to allege in the complaint that the judgment in plaintiff's favor in the first action has not been appealed from or that it has been appealed from and affirmed. No authority is cited to support that view, and none which we may safely follow exists. The decision is out of harmony with all others in the New York courts, and contrary to the settled law as declared by its highest court, as is clearly evidenced by *Marks v. Townsend*, 97 N. Y. 590, where it was held that a final judgment, in an action alleged to have been maliciously brought, satisfies the essential element of a final determination of the wrongful prosecution in an action to recover damages for such a wrong, notwithstanding the right of appeal therefrom exists; and that, if an appeal has been taken from the judgment and is actually pending, the judgment, till set aside or reversed, will stand for want of probable cause as much as any judgment can; that a pending appeal is effectual only to sustain an application for an order staying proceedings till the appeal shall have been determined. It is not necessary here to go that far. It is sufficient to hold that, on the question of the status of the alleged wrongful prosecution, it is sufficient to allege, in the action for damages on account of it, that judgment was rendered in favor of the defendant therein; and that if the defendant in the action for damages desires to defeat the plaintiff on that question, he must lay the foundation therefor by answer instead of by relying on an objection to the complaint by a demurrer for insufficiency (*Carter v. Paige*, 80 Cal. 390); that, while the pendency of an appeal may constitute a defense, in the absence of anything to show that there is a pending

appeal from the judgment the presumptions are in favor of the validity and justice thereof; that no allegation on that subject is necessary on the part of the person relying thereon; and that the mere right of appeal from a judgment in an alleged malicious prosecution does not affect the right of the defendant therein, if he is the prevailing party, to pursue his prosecutor in an action for damages.

The further claim is made that the complaint is insufficient because it shows that in the alleged wrongful prosecution the defendant was brought into court by the mere service of a summons, neither his personal liberty nor his property being interfered with. If the nature of the suit were such as appellant's counsel claim, there would be much authority to sustain their position. The rule in England, when this country was within its jurisdiction, was and still is, that since costs are allowed to the successful defendant in a civil suit, they are presumed to compensate him for all damages suffered, if neither his person nor property is interfered with, regardless of whether the prosecution is maliciously wrongful or not. Ordinarily we would say that such rule should be regarded as part of the common law and binding upon courts here till changed by statute, the same as any other common-law principle. But it does not seem to have been so regarded to any great degree. Courts have treated the subject of whether the right to compensation for malicious prosecution of a mere civil case, without interference with person or property, exists, as matter of judicial policy, to be determined according to varying opinions of judges of supreme judicial tribunals; though the decisions in regard thereto, found in the books, are not based on that ground to any great degree, but on what was supposed to be the weight of authority. The result is that on an important branch of the law, that has been settled in England since costs were allowed to the successful defendant by the statute of Marlbridge (52 Hen. III, 1267) the

courts of the states of this Union, and the text-writers as well, are in as much confusion as in respect to any other branch of the law that could be suggested.

What we say as to the law of England is supported by the following quotation from the opinion of Lord BOWEN in *Quartz Hill C. G. M. Co. v. Eyre*, L. R. 11 Q. B. Div. 674, 690:

"The broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. . . . The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause."

To support what we have said as to the confusion of authority in this country, we refer to the following: In 3 Lawson, Rights, Rem. & Pr. § 1082, we are informed that "most of the earlier cases in the United States, and a few of the recent ones, follow the English rule; but others, and it would seem on better grounds, sustain the action," where neither person nor property is interfered with in the alleged wrongful action. The note to the text indicates that the authorities in favor of the English rule are much more numerous and are as recent as those to the contrary, and that the latter are based almost wholly on *Pangburn v. Bull*, 1 Wend. 345; *Whipple v. Fuller*, 11 Conn. 582; and *Closson v. Staples*, 42 Vt. 209. An examination of those cases indicates that the rule, at its inception in this country, was founded in error.

The first invasion of the common-law rule seems to have been made in *Pangburn v. Bull* in 1828; the next in *Whipple v. Fuller*, 1836. In the first case it seems that the

change in the ancient English rule, founded on the statute of Marlbridge, was overlooked. All the supporting American authorities cited by the court were cases of arrest and bail. In the Connecticut case the change in the English rule was recognized, but the court declined to follow it, preferring, for reasons stated, to follow the doctrine established prior to the statutory right of successful defendants to costs. The Vermont court followed Connecticut and adopted its reasoning. The cases referred to were followed in *Eastin v. Bank of Stockton*, 66 Cal. 123, though it was said that the weight of authority, American as well as English, and the text-writers, is the other way. In *Kolka v. Jones*, 6 N. D. 461, it seemed to the court that the weight of American authority was against the English rule. In 14 Am. & Eng. Ency. of Law, 34, it is said the authorities on the question are evenly balanced. The author, for support, refers to an article by Mr. John D. Lawson, published in 1882. 21 Am. Law Reg. 281, 353. Other writers, including some judges, have cited Mr. Lawson's article as if it accorded with the idea that the English rule is condemned by the weight of authority in this country. A careful reading of such article shows that the writer's conclusion was to the contrary, and that courts and text-writers who have referred to it to support the departure from the English rule have adopted the author's idea as to what is the better rule instead of the one that has the greater support in American decisions. Here is his conclusion:

"We have now reviewed all the American cases, *pro* and *con*, and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text-writers we have cited,—Swift, Townsend, Addison, and the authors of the American leading cases, who follow the English adjudications; Mr. Weeks, who limits the right to 'exceedingly vexatious suits where special damage has been actually suffered;' and Judge Cooley, who

discourages the remedy without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all. Of the thirteen cases we have just examined, three . . . hold that the action is not sustainable *because* it is not, three that it will not lie because the defendant has his costs, which, in England, is considered a sufficient remedy. . . . In but five cases: *Pangburn v. Bull*, 1 Wend. 345, in New York; *Whipple v. Fuller*, 11 Conn. 582, in Connecticut; *Closson v. Staples*, 42 Vt. 209, in Vermont; *Marbourg v. Smith*, 11 Kan. 554; and *Woods v. Finnell*, 13 Bush, 629,—do the courts recognize that there is a wrong for which there should be a remedy. But while the weight of authority denies the action, the weight of reason allows it. We have set out at length the arguments of the courts *pro* and *con*, and no one can read them without being struck with the weakness of the position assumed by the majority of the American courts that have been called upon to deal with this question, and of the writers who have stated the law as they understood the decisions." 21 Am. Law Reg. 368, 369.

In *Smith v. Mich. B. Co.* 175 Ill. 619, the court said that the great weight of American authority and the better reasoning are in accord with the English rule; that it was preferable to follow what Mr. Lawson said as to which way the greater weight of authority points, since the court's examination of judicial and elementary authority on the subject confirmed him, than to follow his judgment as to what the law ought to be. In Stephen, Mal. Pros. (Am. ed.), 21, it is said in the note that the rule is well settled in the United States contrary to the rule of the English courts. How valueless the writer's work is to a correct understanding of the subject is seen from the fact that *Whipple v. Fuller*, *Pangburn v. Bull*, *Closson v. Staples*, and other cases following their lead, are cited as holding the same as *Eberly v. Rupp*, 90 Pa. St. 259; *Muldoon v. Rickey*, 103 Pa. St. 111; *Wetmore v. Mellinger*, 64 Iowa, 741, and other cases which in fact distinctly follow the English rule. The writer of the note says, apparently intending to use language in accord

with the opinion of BECK, J.: "And in such cases the plaintiff is entitled to recover the damages sustained by him;" while in fact Justice BECK used this language:

"We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action."

So careful a writer as Judge Cooley does not venture to say definitely which way the weight of authority preponderates in this country, though his language leads one to believe that, in his judgment, it is in favor of the English rule. He confines the civil actions that may support one for damages for malicious prosecution by the settled law, to maliciously instituting and prosecuting proceedings in bankruptcy, suits in which the defendant is arrested, suits in which the property of the defendant is attached, and proceedings to have a party declared insane and placed under guardianship. He says, as to other civil actions:

"In some cases it has been held that an action may be maintained for the malicious institution without probable cause of any civil suit which has terminated in favor of the defendant; but the English authorities do not justify this statement, and there is much good reason in what has been said in a Pennsylvania case (*Mayer v. Walter*, 64 Pa. St. 283), that 'if the person be not arrested or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on an allegation of malice, the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first." Cooley, Torts (2d ed.), 219.

The first significant case found in the American decisions is *Ray v. Law*, Pet. C. C. 207, decided in 1816, where the English rule was followed to the letter, it being said that, "If bail be not demanded, it is unimportant how futile and

unfounded the action may be, as the plaintiff is punished by the payment of costs and the defendant is not materially injured." The following authorities, in addition to those already referred to, support Judge Cooley's observation: *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104; *Bitz v. Meyer*, 40 N. J. Law, 252; *Potts v. Imlay*, 4 N. J. Law, 330, 7 Am. Dec. 603; *Woodmansie v. Logan*, 2 N. J. Law, 93; *Mitchell v. S. W. R. Co.* 75 Ga. 398; *Kramer v. Stock*, 10 Watts, 115; *Gorton v. Brown*, 27 Ill. 489; *Ely v. Davis*, 111 N. C. 24; *Cade v. Yocum*, 8 La. Ann. 477; *Thomas v. Rouse*, 2 Brev. 75. The doctrine of those cases and the mischief it is aimed at are well indicated by the following language from the opinion in *Ely v. Davis, supra:*

"We may as well say that the law seems to be settled by the weight of authority, although there are some decisions to the contrary, that an action will not lie for malicious prosecution in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law or their equivalent in equity, or in the proceedings in bankruptcy, or like cases, where there was some special damage resulting from the action, and which would not necessarily result in all cases of the like kind."

"The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have their claims determined in the courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause an action for malicious prosecution would lie against him, would open the floodgate to a species of litigation hitherto unknown in North Carolina, the absence of which, up to the present time, indicates that it has not heretofore been recognized."

The Iowa court, in *Wetmore v. Mellinger*, 64 Iowa, 741, mentioned, as considerations for the doctrine that the malicious prosecution of a mere civil suit, without interference with the person or property of the defendant, will not sustain an action for damages, the following:

"The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. . . . If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice?"

From what has been said it will be seen that the proposition submitted and contended for by appellant's counsel ought not to receive approval as the law of this state without the most careful consideration of the subject in a case necessarily depending upon a correct solution of it. As at present advised, we are not prepared to say that such a case has been heretofore decided by this court. *Noonan v. Orton*, 30 Wis. 356, was not such a case. There the plaintiff's property was seriously interfered with by successive, unnecessary, and vexatious equitable levies thereon in garnishee proceedings, and the ground of the action was abuse of the process of the court. In our judgment the present case does not necessarily turn on the broad proposition contended for. The alleged wrongful action was not an ordinary suit, where neither person nor property was interfered with, and where there was no damage other than such as generally results from ordinary civil actions in such circumstances. The action was brought ostensibly for the purpose of winding up a partnership. Before it was commenced, respondent was in possession of the partnership property as much as appellant. The purpose of the action was to as effectually deprive him of that possession and subject it, *in invitum*, to the claim of appellant, as if it were levied upon by writ of attachment. Under such circumstances damages other than taxable costs necessarily follow. Moreover, special damages are expressly alleged in the complaint. The pleader says, in effect, that the purpose of the plaintiff was, by means of the winding-up proceedings, to obtain possession of the partnership property,

in form as an officer of the court for the benefit of the person legally entitled thereto, but in fact for the benefit of the plaintiff; and, through the forms of law, to administer the property ostensibly for the legitimate purpose of a winding-up suit, but in fact to enable the plaintiff to control the property, and, in an indirect way, to obtain the full title thereto; and that such purpose was fully consummated, whereby respondent's interest in the firm assets was wholly lost to him. The same reasoning that supports an action for damages for maliciously and without probable cause instituting and prosecuting proceedings to have a person declared a bankrupt applies to an action maliciously brought to wind up a partnership, founded on alleged misconduct of the defendant.

In quite a recent English case to which we have already referred (*Quartz Hill C. G. M. Co. v. Eyre*, L. R. 11 Q. B. Div. 674), wherein the rule that an ordinary civil action, neither the property nor the person of the defendant being interfered with, causing special damage, though maliciously brought and prosecuted, will not sustain an action for damages, was maintained with as much clearness and firmness as in any previous case, it was held that an action maliciously brought and prosecuted to wind up a partnership should not be classed with those where the damages to the defendant are deemed to be *damnum absque injuria;* but under the third head of actionable wrongs growing out of malicious prosecutions, laid down by HOLT, C. J., in *Savile v. Roberts*, 1 Ld. Raym. 374, 378, namely, actions where a man's fair fame and credit are injured. It was said that such an action is not like an ordinary action for fraud, where the wrong done by merely bringing the action is supposed to be remedied by the vindication of the defendant at the trial; but its effect is like that in wrongful proceedings in bankruptcy — the good name, fame, and credit of the person accused is necessarily seriously injured. That seems plain, and it is equally plain that such actions fall within

the class held to constitute a good foundation for an action for damages for malicious prosecution on account of the interference with property rights. Any particular method of interfering with property rights, as by writ of attachment, is not material. An equitable levy upon property, as in garnishee proceedings, or the deprivation of the defendant of his property by means of the appointment of a receiver, or any other means whereby his property is taken into the custody of the court or taken out of the custody of the owner and out of his free control, as in *Noonan v. Orton*, 30 Wis. 356, which, in the ordinary course of things, causes damage not reached by a mere judgment of vindication or for costs, is sufficient. This action was not commenced by service of a summons and prosecuted without the person or property of the defendant being interfered with directly to his damage; but, as before indicated, the defendant was deprived of the possession of his property, and a growing business, of which he was part owner, was abruptly stopped and closed out, necessarily causing loss to him, not only by depreciation in the value of the firm assets, but by destruction of the business in which the property was used, and by injuring respondent's good name and fair fame as a merchant and member of the community.

The further point is made that the complaint is insufficient because it does not contain an allegation that the plaintiff was damaged by the wrongs complained of to some specific amount. That must be ruled against appellant on the well-settled principle that, where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages. *Luessen v. Oshkosh E. L. & P. Co.* 109 Wis. 94; 4 Ency. of Pl. & Pr. 618.

By the Court.— The order appealed from is affirmed.

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DAVEY, Respondent, vs. THE CITY OF JANESVILLE, Appellant.

October 15 — November 5, 1901.

Municipal corporations: Personal injuries: Qualifications of jurors: Taxpayers: Estoppel: Expert testimony: Hypothetical questions: Objections should be specific: Amendment of special charter: Ordinance adopting part of general charter: Judicial notice: Claims: Disallowance: Appeal: Pleading: Premature notice of trial: Waiver: Undertaking: Damages.

1. In an action against a city for personal injuries, the plaintiff may ask jurymen whether the fact that as taxpayers they would be called upon to pay a part of any judgment recovered by plaintiff would influence their verdict.
2. Signifying satisfaction with the jury as constituted estops a party from questioning on appeal the correctness of a ruling of the trial court overruling his challenge of a juror.
3. An objection to an hypothetical question should, upon request, be made specific and the exact nature of the defect in the question pointed out, in order to give to the court an opportunity to pass upon the precise question involved and to the opposing counsel an opportunity to remove the objection or supply the defect by other testimony.
4. In an action for personal injuries a physician who had attended the plaintiff professionally after the accident, and had testified to her condition and to the objective symptoms observable, is *held* to have been properly allowed to state his opinion as to the cause of her present condition, based upon what he saw of her condition and upon the facts that he had testified to.
5. Subd. 9, sec. 31, art. IV, Const., prohibits the legislature from amending the charters of cities, and sec. 32 provides for the adoption of general laws for that purpose. Secs. 925-1 to 925-269, Stats. 1898, embody a general charter law, and sec. 926 provides that any city operating under a special charter may by ordinance adopt any chapter, section, or subdivision of such general charter in addition to or in lieu of the provisions of its special charter, and that such ordinance shall operate to that extent as an amendment of such charter. *Held*, that the court will take judicial notice of the amendment of a special charter by the adoption of such an ordinance.
6. Where pursuant to law an appeal has been taken to the circuit court from the disallowance of a claim by the common council of a city,

it is not necessary that issue should be joined in order that the case may be noticed for trial. If no formal pleadings are required by the trial court, the claim serves as a complaint and the law implies the fiction of a general denial.

7. The irregularity of a premature notice of trial is waived if, after the objection is overruled, the party goes to trial on the merits.

8. Sec. 925-60, Stats. 1898, provides for the giving of an undertaking on appeal to the circuit court from the disallowance of a claim against a city by the common council, "conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant." *Held*, that an undertaking which followed the exact words of the statute, but added after the word "appellant" the words "by the court," was sufficient.

9. In an action for personal injuries caused by a fall on a defective sidewalk, a recovery of $5,000 damages is *held* not excessive, the evidence showing plaintiff to be in a very bad condition, with small chances of improvement.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

The plaintiff brings this action to recover damages for injuries alleged to have been sustained by her by reason of the insufficiency and defective condition of a certain sidewalk in the city of *Janesville*. On July 19, 1900, the plaintiff presented her claim to the common council of said city, setting out at length her claim for damages, and describing the alleged insufficiency in the sidewalk, its location, and the manner in which the accident happened. To this she annexed a copy of her notice to the city of the injury sustained. The council failed to pass upon the claim within sixty days after its presentation, whereupon the plaintiff took her appeal to the circuit court for Rock county. She presented an undertaking which recited that she would "well and truly pay all costs that shall be adjudged against the said appellant, *Anna E. Davey*, by the court." Her appeal, with a proper return, was duly filed in the circuit court, and the

action was noticed for trial at the April term, 1901. At that time the defendant made a motion to strike the case from the calendar on the ground that no issue of law or fact had been joined therein, and for the further reason that the court had no jurisdiction of the controversy between the parties as an action, and also because the undertaking contained words of limitation not warranted by law, in that the words "by the court" must be held to apply to the circuit court alone. The motion was denied and duly excepted to. The court then ruled that the claim presented to the council should stand for a complaint. The defendant answered by a general denial, and alleged contributory negligence.

During the progress of impaneling the jury, the plaintiff's counsel was allowed to ask several jurymen who were residents of the city of *Janesville*, over defendant's objection, whether the fact of residence, and liability to pay taxes in case a judgment was obtained for plaintiff, would influence them in arriving at a verdict. The juror Heise, upon examination by defendant's counsel, testified as follows:

"*Q.* You say you thought you could render an impartial verdict. I will ask you whether the fact that a woman is in a very bad, distressing condition,— whether in that case your sympathies would influence you or not? *A.* Well, I don't know. If she had been hurt so she suffered, my sympathies would be with her. *Q.* Do you think it would influence your verdict any? *A.* Yes, sir. *Mr. Ruger:* Your honor, I suggest that that is a proper ground of excuse. *Mr. Jeffries:* I think not. His answer is, if the facts show that she is entitled to it. *Court:* I don't think this is a ground for excuse. It is a proper question to ask. *Mr. Ruger:* We ask that the juror be excused. *Court:* You are not conscious of any bias or prejudice either for or against the plaintiff or against the city, are you? *A.* No, sir. *Court:* Do you believe you could try the case fairly and impartially upon the testimony? *A.* Yes, sir. *Mr. Jeffries:* We are satisfied with the jury. *Court:* Are you satisfied with the jury, Mr. Ruger? *Mr. Ruger:* Yes, sir."

During the trial the following question, directed to the doctor who attended the plaintiff, was objected to by defendant's counsel:

"*Q.* Assuming that on the night of the 14th of April, 1900, this plaintiff about eight o'clock in the evening fell on the sidewalk here in the city of *Janesville*, at the time she fell wrenching her back and neck and causing injury to her hip, and she returned home, and afterwards came to your office, and then you saw upon your examination,—you saw the condition she was in,—and then the condition which you have testified to here, and assuming that she was well prior to that time, and had been for many years, what, in your judgment, was the cause of her present condition? (Objected to as incompetent.) *Plaintiff's Counsel:* I ask the counsel if he has any changes to suggest in that question,—anything that is not included which should be included, or anything that is put in that is not in evidence,—that he point it out specifically. *Defendant's Counsel:* I have no suggestions to make as to how you should ask your question. (Overruled. Exception by defendant.) *A.* I should say from the severe injury either to the sciatic nerve or the spinal cord,—the injury on the night of April 14th. As far as I know, that is my judgment."

Somewhat similar questions directed to other medical experts were objected to, but were overruled. The jury rendered a verdict for plaintiff for $5,000. A motion for a new trial was denied, and from a judgment for plaintiff the defendant has appealed.

F. C. Burpee, city attorney, and *Wm. Ruger*, of counsel, for the appellant, contended, *inter alia*, that if an ordinance adopting the provisions of the general charter exists, the court is not apprised thereof by either pleadings or proof and cannot take judicial notice that such is the fact. *Stittgen v. Rundle*, 99 Wis. 78, 80; *Fitts v. Cream City R. Co.* 59 Wis. 323, 327; *Pettit v. May*, 34 Wis. 666, 674; *Quint v. Merrill*, 105 Wis. 406, 408; *Horn v. C. & N. W. R. Co.* 38 Wis. 463, 468; *Janesville v. M. & M. R. Co.* 7 Wis. 484, 490; Stats. 1898, sec. 925—69, note.

For the respondent there was a brief by *Fethers, Jeffris & Mouat*, and oral argument by *M. G. Jeffris* and *M. O. Mouat.*

BARDEEN, J. Several jurymen who were residents and taxpayers in the city of *Janesville* were asked whether the fact that they might be called upon to pay a part of any judgment recovered by plaintiff would influence their action in arriving at a verdict. They answered that it would not. Defendant's counsel argue that this kind of an examination might have a tendency to cause jurors to lean towards the plaintiff's side of the case, in order to prove that they were not affected by their slight financial interest in the result. At common law the authorities are uniform that taxpayers of a city, in an action against it, might be excluded from the jury *ex mero motu*, or upon challenge for this cause, on the ground that they might be responsible for a ratable proportion of whatever verdict might be rendered against the city, and to that extent pecuniarily interested in the result of the suit. Thompson & M. Juries, § 179. This rule has been changed by statute in most states, probably on the ground that the interest is so inconsiderable as not to be likely to influence individual action. We see no reason why a plaintiff, who is the most likely to be affected by the interest of the juryman, may not make the inquiries mentioned, with a view of establishing a foundation for the exercise of the right of peremptory challenge, if for no other purpose. The fear that such examination would be likely to arouse a tendency to lean the other way is more imaginary than real.

The juror Heise testified that the fact that a woman was in a bad and distressing condition, and had been hurt so she suffered, would arouse his sympathies and would influence his verdict. He also said that he believed he could try the case impartially upon the testimony. Notwithstanding this apparent contradictory condition of the juror's mind, defendant's challenge was overruled. At the close of the colloquy

both sides signified that they were satisfied with the jury. This was a waiver of the formal objection to the juror mentioned, and effectually foreclosed the defendant from urging the objection here made, even if the ruling of the court thereon were deemed erroneous. *Emery v. State*, 101 Wis. 627.

The objection to the hypothetical question set out in the statement was that the question was incompetent. Defendant's counsel declined to make his objection more specific, and did not advise the court of the precise grounds of his objection. The testimony sought to be elicited was not incompetent. If the form of the question was bad,—if it omitted important elements necessary to give the jury a proper understanding of the basis of the doctor's testimony,—it was the duty of counsel to point out to the court the missing elements, and make his objections specific enough to advise the court of the alleged imperfections in the question. This he failed to do, and this fact alone was sufficient to warrant the court in overruling the objection. But, even if this were not so, still we think the question was proper. The witness was one who had attended the plaintiff professionally after the accident. He had theretofore testified to her condition, and to the objective symptoms observable. He was then asked to state his opinion as to the cause of her present condition, based upon what he saw of her condition, and upon the facts that he had testified to. We are unable to perceive any just cause for complaint against either the form or the substance of the question, as directed to the attending surgeon. What has been said regarding the necessity of making objections specific applies to the complaint made against the questions put to the other medical experts. The criticism now is that such questions assumed facts not proven, yet, when appealed to by the other side to point out the objectionable or unwarranted assumptions, counsel declined to make any suggestion or state more fully his objec-

tion. It was only fair that the trial judge should have an opportunity to pass upon the precise question involved, and that the exact nature of the defect in the question should be pointed out, and also that the opposing counsel should have the opportunity to remove the objection or supply the defect by other testimony. 3 Jones, Ev. § 896.

The most important question involved in this appeal arises upon the motion made to dismiss the proceeding for want of jurisdiction. The charter of the city of *Janesville*, said to have been in force at the time this action was commenced, was ch. 221, Laws of 1882. The published law contained no requirement that a person having a claim for damages against the city for injuries on its streets should present the same to the council, and no provision for an appeal therefrom to the circuit court. This case was commenced by the presentation of plaintiff's claim to the council. The council failed to take action within sixty days, and thereupon she gave an undertaking and took an appeal to the circuit court. Such proceedings were presumably taken pursuant to the requirements of secs. 925—58 to 925—60, Stats. 1898. Nothing appears in the claim filed, nor was any proof offered on the trial, going to show that the city of *Janesville* had ever adopted the provisions of the general charter law above referred to. Under this branch of the case, defendant's entire argument is based upon the assumption that this court is bound, in the determination thereof, by the law as it appears in the special charter of the city. We are told that the common council of the city of *Janesville* is not an inferior court or tribunal from which an appeal lies to the circuit court, and hence the attempt to get into court by the presentation of a claim and an appeal from the council is not a proceeding warranted by any law of this state. Under the view we have taken of this case, we need not consider the effect of appearance by the city and subsequent litigation of the issues presented. Whether such appearance would or would

not confer jurisdiction under the circumstances it is not necessary to decide. The main point raised is of importance, and is not unattended by difficulties. Stripped to the skeleton, it is whether this court may or will take judicial notice of the adoption by cities of portions of the general charter law.

Courts are bound to take notice of the public statutes of the state wherein they are held. There is no rule of evidence better established than this, and the only differences of opinion that have arisen under it are in determining what are public statutes, within its meaning. 1 Jones, Ev. § 113. The city charter of *Janesville* is a general law. *Clark v. Janesville*, 10 Wis. 136. Following the rule above stated, it would seem that if, by any process deemed legal, such charter has been amended, this court will be obliged to take judicial notice of such change. Since the amendment to the constitution in 1892 forbidding the legislature from amending the charters of cities (subd. 9, sec. 31, art. IV), no power has existed to make such amendment, except that it be done by general laws having uniform operation throughout the state, pursuant to the provisions of sec. 32, art. IV. This section provides that "the legislature shall provide general laws for the transaction of any business that may be prohibited by section 31." Presumably in obedience to this mandate, the legislature adopted the general charter law (secs. 925—1 to 925—269, Stats. 1898), and provided that cities acting under special charters might adopt the whole or some specific part of it in lieu of existing provisions. Sec. 926, Stats. 1898. Such adoption was to be upon published notice, by ordinance, and in accordance with certain requirements not material to be here mentioned. It also said, "and when adopted as herein prescribed such ordinance shall operate to that extent as an amendment of such charter." *Adams v. Beloit*, 105 Wis. 363, establishes the constitutionality of such legislation, and *State ex rel. Boycott v. La Crosse*,

107 Wis. 654, mentions certain of the limitations attending municipal action.

We have, then, the power to set in motion the machinery of amendment lodged in common councils, and the fact that such amendments are to be effectuated by ordinances duly adopted by local boards, and when so adopted to have the effect of a general law, or, rather, the general law is to go into effect in a given locality by virtue of certain prescribed municipal action. Right here the defendant appeals to another rule adopted in this state,—that this court is not bound to take judicial notice of city ordinances or mere local by-laws. *Pettit v. May*, 34 Wis. 666; *Horn v. C. & N. W. R. Co.* 38 Wis. 463; *Stittgen v. Rundle*, 99 Wis. 78. The situation is anomalous. The eccentric character of the situation arises from the power vested in local authorities to take action equivalent in effect to the passage by the legislature of a direct amendment, as was done prior to the amendment. Under these circumstances it seems clear that there is but one thing this court can do. It being admitted that the adoption of the proper ordinance operates as an amendment of the charter to that extent, under the rule that the court must take judicial notice of the charter of the city it must also take such notice of all amendments as are made thereto under due forms of law. Any other conclusion might lead to confusion or result in a practical denial of justice. When a course of procedure, as in this case, indicates action under an amended charter, the court may pause to ascertain the fact, and then govern its judgments accordingly. If the amendment has the force of a general law, as it seems to us it must, then it was not necessary to plead it. It may be somewhat burdensome to this court to ascertain the fact of amendment, but we may not shrink from the performance of that duty for such reason. This situation results from the anomaly of permitting amendments to be made in the manner stated, but so long as this is deemed

lawful the attendant burdens must be shouldered and carried. The legislature may relieve the difficulty by appropriate legislation providing for filing with the proper officer a certificate of municipal action in that regard, and publication thereof with the session laws.

Another objection urged is that the case was noticed for trial without any issue having been joined, and hence should have been stricken from the calendar. The law provides many instances of appeals from the action of county, city, or other municipal bodies, and in no instance that we are aware of has the court denied the right to notice the case for trial because no issue had been made up. In all such cases, if no formal pleadings are required by the trial court, the law implies the fiction of a general denial, and the litigation is not delayed or postponed because a formal answer has not been interposed. If the rule contended for by defendant should prevail, a default action appealed from justice's court could not be noticed for trial by the plaintiff until the defendant had come in and made up an issue. Such has never been considered the rule, so far as the experience of the writer of this opinion goes. But, if this were not so, the irregularity of a premature notice of trial is waived if after the objection is overruled the party goes to trial on the merits, under the rule laid down in *Mills v. Nat. F. Ins. Co.* 92 Wis. 90. This is what the defendant did in this case, and it cannot now be heard to urge the ruling of the trial court as error.

The objection to the sufficiency of the undertaking is finical. Sec. 925—60 provides for the giving of an undertaking "conditioned for the faithful prosecution of such appeal and payment of all costs that shall be adjudged against the appellant." The undertaking in suit follows the exact language of the statute, but adds after the word "appellant" "by the court." We are informed that, as the appeal was to the circuit court, these words must be considered as

a limitation to only pay such costs as may be adjudged by that court. The point is too fine. It requires no effort at construction to hold that the undertaking means that the plaintiff will pay all costs adjudged by any court given power in the premises. This is in conformity to the ruling in *West v. Eau Claire*, 89 Wis. 31. It may not be improper to remark, however, that no good reason is perceived why attorneys, in drawing papers of this kind, should not follow the statute as written, and not attempt to graft on conditions or limitations not found in the law.

A further suggestion is made that the verdict is clearly excessive, when the results justly attributable to plaintiff's fall, as shown by competent testimony, are considered. Just what those results were is one of the litigated questions in the case. The evidence showed plaintiff to be in a very bad condition, with small chances of improvement, and that this condition was attributable to her fall. While the amount of the verdict is large, it is not so disproportionate to the injury sustained that we feel warranted in disturbing it.

By the Court.— The judgment is affirmed.

GAGER and others, Respondents, vs. PAUL, Administrator, imp., Appellant.

October 16 — November 5, 1901.

Banks and banking: Insolvency: Stockholders' liability: Estates of decedents: Transfers: Limitation of actions: Capital stock not fully paid: Fraud: Creditors' action: Unlawful dividends: Liability of residuary legatee: Trial: Discretion: Rebutting presumption of payment: Appeal: Parties.

1. The statutory liability of stockholders in a bank under sec. 47 of the banking act may be enforced against the estate of a deceased stockholder in an action by creditors to wind up the affairs of the bank, and need not be presented as a claim in the settlement of

the estate in the county court; and if the estate has been distributed the residuary legatee will be liable, and in case of his death his personal representative.

2. Under sec. 16 of the banking act (providing that a person holding stock in any bank who shall sell or transfer the same "shall be held and remain for the term of six months from and after such sale . . . personally liable to the amount of the stock so as aforesaid sold . . . for the payment of all debts and liabilities of such bank" existing at the time of such sale), the transferrer's liability is limited to those who were creditors at the time of the transfer, and the action to enforce such liability must be commenced against him within the six months so limited. The commencement of an action to wind up the affairs of the bank within such six months, to which however the person so liable was not made a party within the required time, is insufficient to prevent the running of the statute.

3. A stockholder in a banking corporation received certificates of stock purporting to be full-paid, for which he actually paid but a fraction of the par value. Subsequently his liability for the balance was in form discharged by the application to its payment of an entirely fictitious accumulation of profits, and an increase in the capital stock was paid for in the same manner. *Held*, that as between the stockholder and the bank, the latter could not recover the unpaid portion of the capital stock, but that the transaction constituted a fraud upon the creditors of the bank and gave rise to a right of action in their favor, enforceable only in an equitable action to which the bank is a party.

4. The cause of action in favor of the creditors of the bank in such a case being of such a nature that it could not be adjudicated in the county court in probate proceedings, their rights against a deceased stockholder are not foreclosed by failure to present their claim in that court, but after the settlement of his estate they may enforce them against his residuary legatee.

5. The liability of a stockholder in an insolvent bank to refund dividends paid him in violation of sec. 40 of the banking act is to the corporation and enforceable by it; but a stockholder or creditor may invoke the aid of a court of equity to compel restitution, when the corporation will not act.

6. One who seeks, under sec. 3845, Stats. 1898, to recover from a legatee or next of kin a claim that might have been proved in county court must allege and prove that no time had been fixed in which creditors might present their claims against the deceased for allowance, or that no notice of such limitation had been ordered or given.

7. The right of an insolvent bank, whose affairs are being wound up at the suit of creditors, to recover dividends paid a deceased stockholder in violation of sec. 40 of the banking act, is one provable in county court, and cannot be enforced against next of kin or legatees if opportunity to prove it against the estate was duly given.
8. After disposing of a motion in a cause which is upon the calendar under due notice of trial, it is within the discretion of the court to proceed with the trial of the remaining issues, notwithstanding the prohibition against taking oral evidence on a motion.
9. In proceedings to recover from the residuary legatee of a deceased stockholder in an insolvent bank a balance due on shares of stock derived from her testator, there was evidence that the testator gave a stock note for the shares but no evidence as to what became of it. There was evidence, however, that he never paid more than sixty per cent. on his shares, and that some years later a resolution was passed attempting to pay the remaining forty per cent. out of a fictitious accumulation of profits. *Held*, sufficient to rebut the presumption that the whole of the stock note had been paid.
10. Where judgment was entered against two defendants and one only appealed, the other cannot on such appeal be heard to attack the judgment as against him.

APPEAL from a judgment of the circuit court for Rock county: R. G. SIEBECKER, Judge. *Modified and affirmed.*

This action was originally commenced October 19, 1897, by one Marsden, simply as a stockholder of the Bank of Edgerton, a banking corporation, alleging insolvency and praying the appointment of a receiver. On the 8th of November following the complaint was amended by alleging that Marsden was a creditor to a small amount, so as to pray that the creditors be required to present their claims and become parties to the action Thereafter the present plaintiffs, *Gager* and about twenty others, claiming to be creditors, prayed to be substituted as plaintiffs, and that all directors and stockholders be made defendants, and that the complaint be amended so as to charge all the various liabilities to directors and stockholders, and that the creditors be allowed to recover against them. On March 11,

1898, this petition was granted by order, and the complaint amended accordingly, so as to allege against Rebecca Morgan that one I. P. Morgan owned two shares, of $500 each, of the stock of the bank; that he died on the 29th day of August, 1894, testate; that his will was duly probated October 2, 1894; that Rebecca Morgan had received some $6,000 as residuary legatee; and that his estate was finally settled June 1, 1897,—and claim recovery from Rebecca Morgan, as residuary legatee, of the statutory liability of the face of the stock ($1,000), also the unpaid consideration for the stock, and also for dividends paid to said Morgan and his estate illegally while the bank was insolvent. W. H. Morgan, a son of the deceased, was also made a defendant, upon the allegation, subsequently proved, that this stock had been transferred to him legally and effectively on the books of the company on May 6, 1897, claiming that he, as transferee of the stock, was also liable on all of the three grounds above mentioned. Rebecca Morgan died May 12, 1899, and action was revived against *John Paul* as her special administrator.

The administration of the affairs of the bank in the hands of the receiver having proceeded to the point that it was ascertained that all assets of the bank would be so inadequate to pay the creditors as to leave some $300,000 unsatisfied, and that the capital of the bank was only $50,000, the case was noticed for trial upon the court calendar of the May, 1900, term of the circuit court for Rock county, and at the same time an order to show cause was served, returnable on May 5th, one of the early days of the May term, for consideration of a proposed settlement with most of the larger stockholders and directors, whereby they offered to pay some $56,000 in satisfaction of all their liabilities. The judge of the Rock county circuit court, having been of counsel, requested the attendance of Judge SIEBECKER, of the Ninth circuit, and on April 23d entered a

court order that he be so called in on the 5th of May to hear all motions and applications made in the above-entitled action, and to make all orders or judgments necessary to be made in said action on said day and during the time he shall so attend. On the 5th day of May all parties appeared, and the plaintiffs proposed to go to trial on the remaining issues in the case, with reference to the liability of the Morgans and two or three other stockholders, which the defendants resisted, mainly on the ground that the case was not yet properly reached on the calendar under the special rules of procedure in effect in the circuit court for Rock county. Their objections were overruled, and the court proceeded with the trial.

Upon the trial the facts above quoted from the complaint were made to appear; also, that the corporation had been insolvent for seventeen years prior to the commencement of Marsden's suit, or since 1880; that I. P. Morgan was one of the original subscribers for one share of stock, of $500, of the original organization of $25,000 total capital, subject to a right of increase to $100,000 by vote of the majority of the shareholders; that an apparently full-paid certificate of stock was issued to I. P. Morgan at the time of incorporation, which he retained and which passed to his executors at the time of his death; that in April, 1885, by a proper vote, the capital stock was increased to $50,000, and a certificate of one share, of $500, of such increase, was delivered to and accepted by said Morgan and remained his to his death, and then passed to his executors; that at the time of the original organization there was paid by Morgan, in common with other stockholders, only sixty per cent. of the amount of the respective shares of stock issued to them; that at the stockholders' meeting in 1885, at which the capital stock was increased to $50,000, it was voted to set off the sum of $15,000, undivided profits, to be applied as a payment upon such increased stock, and on the following day it was voted to

apply $20,000 of so-called undivided profits to the payment of the balance due upon the original stock and upon such increased stock, and that said sums of $15,000 and $20,000, respectively, of the moneys of said bank, were so used and applied, and that in no other way, except only for said original sixty per cent., had any part of the original capital stock of said bank ever been paid for, or of said increased capital stock. It also appeared that from November 10, 1890, up to and including July 16, 1896, there were paid semi-annual dividends of four per cent. each to I. P. Morgan and to his executors, and that a dividend of three per cent. was paid in May, 1897, to W. H. Morgan personally, as assignee of said stock.

These facts being substantially found by the court, judgment was entered against the appellant, administrator of Rebecca Morgan's estate, for the $1,000 statutory liability; for forty per cent. of the original first share of stock, $200; and for the whole amount of the second share of stock, issued upon alleged increase of capital, $500,—together with interest on all of said sums from July 11, 1899, the date when the amount of claims against the bank was ascertained, and an interlocutory judgment entered declaring the liability of stockholders, and also that the appellant was liable for all of the dividends above mentioned, excepting that of May, 1897, paid to W. H. Morgan personally. From this judgment defendant *John Paul*, as administrator of Rebecca Morgan's estate, brings this appeal.

E. D. McGowan, attorney, and *L. B. Caswell*, of counsel, for the appellant, argued, among other things, that the action as to Rebecca Morgan was not commenced until she was impleaded. Sec. 4239, Stats. 1898; *Levy v. Wilcox*, 96 Wis. 127; *Webster v. Pierce*, 108 Wis. 407, 418, 419; *Bell's Appeal*, 115 Pa. St. 88; *Sands v. Burt's Ex'rs*, 1 Albany L. J. 124; *Newman v. Marvin*, 12 Hun, 236; *Shaw v. Cock*, 78 N. Y. 194; *Campbell v. Bowne*, 5 Paige, 34; *Rucker v. Dailey*,

66 Tex. 284; *German F. Ins. Co. v. Bullene*, 51 Kan. 764; *Union Pacific R. Co. v. Wyler*, 158 U. S. 285; *Wilson's Adm'r v. Holt*, 91 Ala. 204. The estate of Rebecca Morgan was not liable for the unpaid capital on the shares held by I. P. Morgan. In the absence of an express statute the assignor of stock is released. *Bend v. Susquehanna B. & B. Co.* 6 Har. & J. 128; *Cleveland v. Burnham*, 55 Wis. 606; *Webster v. Upton*, 91 U. S. 70; *Nat. Bank v. Case*, 99 U. S. 631, 632; Thompson, Liability of Stockholders, §§ 90–102; *Bowden v. Johnson*, 107 U. S. 251; *Isham v. Buckingham*, 49 N. Y. 216; Taylor, Priv. Corp. §§ 718-720; Angell & A. Corp. § 534.

For the respondents there was a brief by *Sutherland & Nolan* and *Olin & Butler*, and oral argument by *Geo. G. Sutherland* and *H. L. Butler*.

John Cunningham and *C. E. Pierce*, for the defendant *W. H. Morgan*.

DODGE, J. This appeal presents a few of the very numerous questions that are liable to arise for solution by the courts in working out the policy of the general closing-up action upon insolvency of corporations, especially of banking corporations whose stockholders are chargeable with the so-called additional statutory liability for the par value of their stock. The recoveries here sought are of three classes: (1) The statutory liability above mentioned; (2) the liability of a stockholder for the amount of his stock subscription where, by reason of contract with the corporation, it has not been paid for in full, either in money or its equivalent; and (3) the liability of a stockholder for dividends received by him practically out of the capital of the corporation,—that is, paid and received at a time when there were no earnings or profits out of which they could be paid. Some of these questions are further involved by the peculiar circumstance that the action is against a residuary legatee of a stockholder, brought after the completed settlement of his estate.

1. *Statutory Liability.* This rests upon two sections of the banking act, now included as subdivisions under sec. 2024, Stats. 1898. These are subsecs. 47 and 16 [pp. 1537, 1539]. Subsec. 47 provides: "The stockholders in every corporation or association organized under the provisions of this act shall be individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind." Subsec. 16 provides that "each and every person owning or holding stock in any bank or banking association who shall sell, transfer or assign his stock, . . . shall be held and remain for the term of six months from and after such sale . . . personally liable to the amount of the stock so as aforesaid sold . . . for the payment of all debts and liabilities of such bank or banking association existing at the time of such sale, transfer or assignment." That appellant's testator was a stockholder, and that the stock remained in his estate, and the property in trust of his executors, until May 6, 1897, and was then transferred, is conceded; also, that this action was commenced under secs. 3218, 3219, by Marsden as a stockholder merely on October 19th, that his complaint was amended so as to allege that he was also a creditor on November 8th, and that further amendment joining Rebecca Morgan as a party defendant and service of summons upon her occurred March 11, 1898. It is contended on the one hand that no suit can be maintained on this liability if it had expired by the statutory six-months limitation before the commencement of the action, and that the action was not commenced against the party sought to be charged until after that period had expired. On the other hand, it is contended that the general action, which might involve the enforcement of this liability, having been commenced on October 19th, within six months after the transfer of I. P. Morgan's stock, the creditors are entitled to hold the estate of I. P. Morgan, and, that having been

distributed, to hold the residuary legatee, Rebecca Morgan, and, she having since died, to hold her administrator.

The maintenance of such an action as this in the circuit court against the estate of the deceased person, instead of the presentation of claim in the county court against that estate, has already received adequate discussion and decision in *Gianella v. Bigelow*, 96 Wis. 185; and we entertain no doubt that the rights of recovery of this liability are the same against the appellant as they would have been against I. P. Morgan if living. We must therefore proceed to consider the force of our statutes above mentioned.

Subsec. 16 differs radically from the provisions on the same general subject in other states, and there are cited to us no decisions from other states helpful upon its construction. Some statutes with more or less clearness extend the liability of a transferrer, not to the then creditors for a term of six months, but to all who shall become creditors within a term of six months; thus warranting a construction to the effect that the class to whom liability shall exist only is limited by that term, and the liability, having arisen, may be enforced when the creditors choose, subject only to the general limitations upon actions. Such construction is clearly excluded by our statute. The liability is limited to those who are creditors at the time of the transfer, and, if that liability were intended to be enforceable at any time within the ordinary period for bringing actions, the clause "for a term of six months" would be meaningless. That clause can have but one significance, and that its obvious one,— namely, that at any moment within the specified period there exists a liability from the transferring stockholder to each and all of the defined class of creditors on which suit can be brought (the form of such suit needing to be in compliance with the holdings of this court from *Coleman v. White*, 14 Wis. 700, to *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624), and that after such six months he is not

liable at all. Hence the only reasonable construction seems to be that, if a suit is commenced while that liability exists, the creditors are entitled to recover, but, after such liability has expired, no action can be maintained or serve to revive it.

It being essential, then, that the action be commenced against the ex-stockholder within six months after the transfer, we must consider what constitutes such commencement. The liability thus imposed is a personal and separate one of each stockholder, and while, for convenience, it can be properly ascertained and enforced only in an action which brings before the court all creditors and all stockholders upon whom the liability is to be fixed and among whom it is to be adjusted, yet in ultimate analysis it is a direct, personal, and legal liability of the individual. That it cannot be adjudicated and enforced against him without making him a party to the action is at least inferentially decided in *Finney v. Guy*, 106 Wis. 256. In that case a contrary doctrine, suggested by the Minnesota court in *Harper v. Carroll*, 62 Minn. 152, which is now urged upon us by the respondent, was repudiated. The necessity that the stockholder shall have been brought before the court by service of process as fully and completely as in any other action against him is recognized and certainly intimated by all our decisions on the subject, among which *Foster v. Posson*, 105 Wis. 99; *Finney v. Guy*, *supra*, and *Eau Claire Nat. Bank v. Benson*, *supra*, may be mentioned.

It must not be forgotten that, while proceedings in equity to close up a banking corporation may include recovery of stockholders' statutory liability, they equally may not; for assets of the corporation or other liabilities to creditors, equitably prior to this, may satisfy all creditors. It is therefore an unwarranted presumption that an action seeking to enforce some of the rights of creditors is necessarily one to enforce all. *Gager v. Marsden*, 101 Wis. 598, 603. The only

safe course, which, while protecting diligent creditors, still gives full protection of this statute to stockholders, is to construe these actions like others,— measure the cause of action by the complaint, and deem them commenced against any defendant when, and only when, any other would be so deemed. On this subject sec. 4239, Stats. 1898, fixes the service of summons as the commencement of an action, except for cases where a diligent attempt to make service may suffice, under sec. 4240. This statute would seem sufficiently unambiguous to conclude the question. It is, however, confirmed by the holding in *Levy v. Wilcox*, 96 Wis. 127, that, however necessary a party may be to the general purpose of an action, it is not commenced against him until he is actually and by name brought in. The conclusion seems irresistible that no suit was commenced to enforce the liability of I. P. Morgan's estate until March 11, 1898, some four months after that liability had expired, and that, consequently, judgment therefor against the administrator of his residuary legatee is erroneous.

2. *Stock Subscription Liability.* It appeared and was found by the court that I. P. Morgan, in 1880 and 1885, received certificates of stock, purporting to be full-paid, for $1,000 par value, for which he in fact paid into the capital of the bank but $300. It quite clearly appears, however, that this was by contract between him and the corporation that he should not be under obligation to pay anything more. That contract is evidenced by the action of the corporation in 1885, when by resolution it attempted to pay for said stock with assets of the corporation, treated and declared as profits, but which were not profits. There can be no doubt whatever that, as between creditors and a stock subscriber, the latter is liable to make good any known or fraudulent deficit between the amount paid by him and the face value of his stock; but the first question is whether, under such circumstances as here presented, this is a liabil-

ity to the corporation, or a liability enforceable only by the creditors, in derogation of the contract between the corporation and its stockholder, as a fraud upon them. If the former it might perhaps be barred by statutes of limitation, or lost by failure to present in county court against the estate of I. P. Morgan. If the latter, no such defense could be urged. Respondent has discussed the situation and appellant cited authorities as if the attempt here were to collect upon an actual contract to pay par value for subscribed stock, and as if the transfer to W. H. Morgan were of concededly part-paid stock. In that respect they are clearly wrong. As between the corporation and I. P. Morgan there was never anything due for these two shares of stock, certainly after 1885. As between it and a transferee for full value, relying on the certificate of full payment, no recovery could be had, though perhaps as to either the corporation might defensively raise the shield of our statute (sec. 1753, Stats. 1898) declaring such stock void. *First Ave. L. Co. v. Parker*, 111 Wis. 1. The corporation could bind itself to accept anything in full payment for stock, so that it could recover nothing more. *Wells v. Green Bay & M. C. Co.* 90 Wis. 442, 452; *Gilman v. Gross*, 97 Wis. 224, 227; 2 Beach, Priv. Corp. §§ 559, 561. But any such contract between corporation and stockholders may be attacked by subsequent creditors, and, if fraudulent as to them, they may demand its repudiation and payment by the stockholder as if it had never been made. *Gogebic I. Co. v. Iron Chief M. Co.* 78 Wis. 427. While by legal fiction it is said that in such proceeding the creditors recover in the right of the corporation, it is still true that they enforce rights which the corporation did not have, and are not precluded from their suit by statutes of limitation, nor by other omissions of the corporation to proceed against the stockholder. That the transaction between the corporation and the stockholder I. P. Morgan, whereby the former accepted, in discharge

of his liability to pay money or its equivalent for his stock, his proportion of an entirely fictitious accumulation of profits, was fraudulent as to creditors, cannot be doubted.

Much that is said in *Gogebic I. Co. v. Iron Chief M. Co., supra*, is directly applicable; but the present case is even stronger. While the acceptance of property, real or personal, mining rights and the like, at an agreed valuation, is to be viewed with consideration of the fact that opinions as to the value of such property differ widely, and that there is possibility that the parties honestly met and dealt upon an estimate of value widely different from that which may appear to the court, it cannot be believed that the corporation and its stockholders are free from fraud against creditors when they indulge in the destruction of the rights of the former by mere manipulation of accounts. If the corporation is insolvent, they know it, or are chargeable with knowledge of it. They must act in peril of that fact, and no intendment or presumption can be indulged that, with the most complete knowledge of the assets and liabilities of the bank, they can have believed in the existence of a surplus when there was none. The transaction is further distinguished from mere acceptance of property, in that it is manipulation of existing conditions only. No new article of property comes into the ownership of the corporation, as to the value of which opinions might differ. Merely by entries upon the books, that which the bank before had as representing $25,000 of capital is called $50,000, and the public invited to become creditors on the faith of the declaration of that fact. We think it plain, therefore, that the demand now made for payment to the receiver or to the creditors of enough to make up the original par value of the two shares of stock of I. P. Morgan is fully sustained by the facts, and that it is a cause of action which never existed in the corporation, and which the creditors never had an opportunity to enforce against the estate of

I. P. Morgan, for the reason that they never had a cause of action at law, but merely a right to sue in equity, where they must necessarily join the corporation and proceed in a manner not possible in county court. *Gianella v. Bigelow*, 96 Wis. 185; *Morey v. Fish Bros. W. Co.* 108 Wis. 520. Hence no obstacle exists to its enforcement now against the residuary legatee, to whom has passed that portion of his estate out of which should be paid any liabilities resting upon her testator. The award of judgment against the appellant for the $700 and interest upon this liability was correct.

3. *Dividends.* These were paid to I. P. Morgan and to his executors from 1890 to 1896, during all of which time, not only was the corporate capital impaired, but the corporation was actually insolvent. Such payments were prohibited by subsec. 40 of the banking act, as, indeed, by the general principles of the law governing corporations. But the question at once arises as to the effect of disobedience of such prohibition. Of course, the stockholder receiving such dividends unlawfully has no right to retain them; but is his liability to repay owed to the corporation and enforceable by it, or can he only be called to account at the suit of creditors defrauded by the payment? The question seems to have been answered by this court, though perhaps not on the fullest consideration. In *Hurlbut v. Marshall*, 62 Wis. 590, 606, in speaking of liability for unlawful receipt of dividends, it is said:

"If the officers, directors, or stockholders, or any one else, have taken and carried away and converted the property or funds of the bank wrongfully and unlawfully or criminally, they are trustees of the bank and remotely of the creditors,—trustees *de son tort*, it may be, but nevertheless trustees,—and may be compelled in this suit to account therefor."

In *Hurlbut v. Tayler*, 62 Wis. 607, 615, it is said of such a stockholder:

"The respondent is liable in this action, like all other persons who have unlawfully become possessed of the funds of this insolvent bank, *to return them to the bank* for the benefit of its creditors."

In *Killen v. Barnes*, 106 Wis. 546, the liability for unlawful dividends is treated as owing to the corporation and to its assignee. Sec. 1765, which prohibits payment of dividends by insolvent corporations generally, seems to recognize that, in case of breach, liability is to the corporation, by providing that such liability is to *restore* the full amount, except in certain cases. Restoration can be made only to the source from which the dividends came. Mr. Thompson assumes, as of course, that the corporation can reclaim an *ultra vires* dividend. Thomp. Corp. §§ 2135, 3555. See, also, *Lexington L., F. & M. Ins. Co. v. Page*, 17 B. Mon. 412; *Hayden v. Thompson*, 71 Fed. Rep. 60, 65. We see no reason to hesitate in adopting the views thus stated and intimated. The dividends received by a stockholder contrary to law are but property of the corporation unlawfully taken into the possession of another, and upon every principle of law and every reason of its policy the owner should have the right to recover it by direct action. This view in no wise militates against the right of one interested either as creditor or stockholder to invoke the aid of a court of equity to compel restitution of such unlawful dividends when the corporation will not reclaim them; but, when he does so, he merely enforces the right which the corporation has, and the relief granted must be measured by that right. Insisting upon that view, appellant urges that the right of the corporation to recover those dividends paid more than six years before the commencement of the action is barred by the statute of limitations. The answer of the appellant administrator, however, did not plead the statute, and if he were defending in his own right it would be waived. This suggests the interesting question whether, when the circuit

court, in the exercise of its equity powers, takes jurisdiction to adjudicate claims against estates of decedents, it ought not to limit itself in allowing them by the policy of sec. 3841, providing as to county courts that "no claim barred by the statute of limitations shall be allowed by the court in favor of or against the estate, as a setoff or otherwise."

That question, however, we need not decide, since we have concluded that another and insuperable obstacle prevents recovery against this appellant or his decedent of any of these dividends. The action against Rebecca Morgan, revived against her administrator, could only be maintained by virtue of our statutes and upon the condition specified by sec. 3845: "When no time has been fixed in which creditors may present their claims against the deceased for allowance or when no notice of such limitations has been ordered or given." The complaint and record are both silent as to whether a time was limited for presentation of claims against the estate of I. P. Morgan, deceased, or notice given. It is essential that one seeking to sue a legatee or next of kin on a claim that might have been proved in county court should allege and prove that these steps were not taken; otherwise, it will be presumed that they were. *Lannon v. Hackett*, 49 Wis. 261. That this demand in favor of the corporation was one provable in county court cannot be doubted. The distinctions in that respect are fully explained in *Lannon v. Hackett*, *supra*; *Bostwick v. Estate of Dickson*, 65 Wis. 593; *Gianella v. Bigelow*, 96 Wis. 185; and *Morey v. Fish Bros. W. Co.* 108 Wis. 520. The right of the corporation was to a mere money recovery for the amount of the unlawful dividends Morgan had received. Its adjudication involved no questions of contribution, and no parties defendant other than I. P. Morgan, nor did it require the exercise of equitable powers over specific property. It was a simple money claim, within the jurisdiction and power of the county court, and cannot be enforced against next of kin or lega-

tees if opportunity to prove it against the estate was duly given. Of course, if these plaintiffs had commenced their present action while the corporation still had a right of procedure and recovery against Morgan's estate, a different situation would be presented. They would then have been permitted to sue in circuit court, because of the necessity of joining the corporation as a defendant. *Morey v. Fish Bros. W. Co.*, *supra*. But they cannot now, after the liability to the corporation has been extinguished, recover in its right what it could not have recovered at the time their action was commenced. The award of judgment against appellant for the dividends was erroneous.

Appellant assigns error upon the taking of evidence at the time when the order to show cause was returnable, and cites us to rules and decisions against the taking of oral evidence upon a motion. This is a confusion of the situation. The court apparently disposed of the motion to authorize settlement, and then proceeded to the trial of the remaining issues in the cause by virtue of its presence on the calendar under due notice of trial. This was within the discretionary power of the court over its calendar, and was not an abuse of that discretion. No error is apparent in this respect.

There is some evidence that, when he took the first share of stock, I. P. Morgan gave a stock note, and there is no evidence what became of it. Appellant contends that the court should have presumed payment of the whole note, and held him liable for no more than the $500 for the second share of stock. If any such presumption results, it is entirely overcome by other evidence. It is in testimony that he paid but sixty per cent. of the first $500 and none of the second, and the resolution of the stockholders in 1885, whereby the remaining forty per cent. of his first stock subscription was attempted to be paid out of his share of accumulated profits, is sufficient to justify the finding against

the payment in any other manner of any more than sixty per cent. upon the stock.

Other assignments of error urged by the appellant are rendered immaterial by the conclusions which we have reached upon the several questions, as a result whereof it is apparent that the judgment against this appellant should be modified by striking out therefrom all except the $700 for the subscription price of the stock issued to I. P. Morgan, with interest thereon.

A brief is filed on behalf of W. H. Morgan, against whom certain liabilities were adjudged as an assignee of the same stock. A portion of this brief is devoted to a defense of the judgment against the appellant, *John Paul.* In that respect he stands in the attitude of a respondent; but another portion of the brief is devoted to criticism of the judgment as against him, and requests a modification and reduction thereof. For that purpose he has no standing, as he has not appealed, and cannot be heard to attack the judgment.

By the Court.— The judgment against the appellant, *John Paul,* as special administrator of Rebecca Morgan, deceased, is modified by striking therefrom all sums adjudged as damages against him, either separately or jointly with another, except the sum of $734.39, and as so modified is affirmed; the appellant to recover costs of this appeal.

CHASE, Respondent, vs. BLODGETT MILLING COMPANY, Appellant.

October 16 — November 5, 1901.

Negligence: Shelling popcorn: Evidence: Instructions to jury: Ordinary care: Acceptance after examination.

1. In an action to recover damages for negligence and unskilfulness in shelling popcorn, by reason of which it was rendered unfit for popping and worthless except for feed and was returned from Chicago

where it had been shipped, evidence that corn from the same crib, raised the same year, and in the same condition, had been shelled in good condition for popping by other parties with cornshellers of the same or similar construction, and that the corn so shelled had been accepted in Chicago and had popped well, was admissible as tending to prove that the corn shelled by defendant might, with proper care, have been shelled so as to be fit for popping.

2. Defendant's foreman testified that, in plaintiff's presence, before beginning the work, he adjusted the rollers of the sheller, which were then closed, so that they were opened as wide as possible. Plaintiff's evidence tended to show that the adjustment had been changed after a portion of the corn had been shelled. *Held*, that it was not error to refuse to allow the foreman, after being recalled, to testify as to how the rollers were before he first adjusted them.

3. Where a witness had testified to hearing a remark made by plaintiff to the foreman in defendant's mill, and other witnesses had testified fully as to the amount of noise and difficulty of hearing in the mill, it was not error to refuse to allow the foreman to testify as to whether the remark could have been heard by such witness.

4. A refusal to instruct that "if the plaintiff was present when the corn was shelled, and saw some of it, and had an opportunity to examine all of it, and afterwards took possession of all of it, and removed it from the mill of the defendant, and then paid for the shelling, and made no objection to it on account of its being broken or injured in shelling, such taking possession of the corn and removing it was an acceptance of the corn, and he cannot recover in this action any damages for the broken condition that was apparent when he removed it," is *held* not to have been erroneous where there was evidence tending to prove that three bags of the corn shelled by defendant were in a proper condition for popping; that the balance (about thirty bags) was badly cracked; and that plaintiff's examination was confined to the three bags which were good.

5. An instruction that ordinary care means "such care as a person of ordinary prudence and skill would usually exercise under the circumstances," is *held* not erroneous.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Jackson & Jackson*, and oral argument by *A. A. Jackson.*

For the respondent there was a brief by *Smith & Pierce*, and oral argument by *William Smith.*

CASSODAY, C. J. This is an action to recover damages, as alleged, for failure to shell a quantity of corn in a good, careful, and workmanlike manner so as to be in a suitable condition to be popped, and to do the work of shelling as well as any one could do it for that purpose, as agreed; that the defendant received the corn and undertook to shell the same, pursuant to such agreement, for the purposes aforesaid, and did actually shell the same, but in such a careless, negligent, and unskilful and unworkmanlike manner that the kernels were so cracked, crushed, and broken as to be entirely unfit for the purpose mentioned, and by such shelling became entirely worthless except for feed. The answer is a general denial. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $32. From the judgment entered thereon the defendant appeals.

The evidence on the part of the plaintiff tends to prove the contract so alleged in the complaint, and the breach of the same by the defendant, and that the corn so shelled was shipped to Chicago and returned, and that not more than one eighth of the same would pop.

1. Error is assigned because the court admitted evidence tending to prove that corn taken from the same crib, and raised the same year, and in the same condition, had been shelled by other parties in good condition for popping, by automatic cornshellers,—one of them being of the same construction, and working upon the same principle, as the defendant's cornsheller in question; and that the corn so shelled by such other persons had also been shipped to Chicago, but had not been returned. We perceive no error in such rulings. It seems to have been an appropriate way of proving that the corn so delivered to and shelled by the defendant was in a suitable condition to be shelled, with proper care, so that the same could be popped. It was also proper to identify and distinguish the corn so

shelled by the defendant and shipped to Chicago, from the corn so shelled by such other persons and shipped to Chicago. What has been said covers the second assignment of error — for admitting evidence tending to prove that the corn so shelled by such other persons popped well.

2. The defendant's foreman, Yarger, testified that the plaintiff did not say in his presence or hearing: "For God's sake, don't smash my corn, or it won't be worth a dollar to me!" nor anything in substance like that. The plaintiff testified to the effect that he so remarked to the defendant's foreman when he first came into the mill, upon examining a bag partly full, which Yarger told him was feed that came down from the corn they had been grinding. The plaintiff's witness Brown testified that the bag so referred to by the plaintiff contained "cleanings of the elevator that had come down ahead of the corn" of the plaintiff, and his witness Kinney testified to the effect that he heard the plaintiff make such remark to the defendant's foreman. Error is assigned because the court refused to allow such foreman to testify whether, standing where they did, Kinney could have heard such remark with the machinery in motion, or if made in an ordinary conversation, or at all. We perceive no error in such rulings. The defendant's foreman and another witness had both fully testified in regard to the amount of noise and the difficulty of hearing in the mill. The question whether Kinney could or could not have heard such remark was for the jury, under the circumstances in evidence.

3. Error is assigned because the court refused to allow the defendant's foreman, after being recalled, to testify as to how the rollers were adjusted before he adjusted them in the plaintiff's presence at the time of beginning the work on the corn in question. The witness had just before testified that when the plaintiff came the rollers were closed, and that they then began to open them. He had testified

before he was recalled that the first thing he did after the plaintiff came, and when he "got into the mill, was to open the feed rolls;" and that he then turned the "hand wheels" as far as possible, with the help of the witness Carney; and that the rollers were wide open enough to allow corn to pass through without being affected by the rollers; that they were three eighths of an inch apart. We perceive no reversible error in such ruling. The plaintiff does not contend that the rollers were not so closed when the foreman first began to so turn the screws, but insists that, if he then opened them as wide as he could, then when he subsequently changed them he must have narrowed the opening through which the corn had to pass. There is evidence tending to prove that the screws had been changed after a portion of the corn had been shelled.

4. Error is assigned because the court refused to grant a nonsuit or to direct a verdict in favor of the defendant. There is dispute about the condition of the corn. The plaintiff contends that, although the defendant disclaimed any experience in shelling corn for the purpose of popping, yet it claimed that it could do so as well as the persons named, who had previously shelled corn for such purpose for the plaintiff; and that the defendant directed the plaintiff to bring on his corn to be shelled by the defendant. The defendant disclaimed any experience in shelling corn for the purpose of popping, and claimed that it had never advertised or given the public to understand that it was engaged in shelling corn for such purpose; but that its machinery was proper for shelling corn, and had been used for that purpose for several years. The defendant's foreman testified substantially to the same facts, and also that when they had weighed one wagon load of the plaintiff's corn they dumped it down, and put a portion of the corn in, so as to see if they were able to get the corn through the roller and cleaner and feed mill into the bag in a satisfactory condition to the

plaintiff; that, after a part of it was so put through, they examined it, and the plaintiff told them to go ahead and put the rest of it through, and that as far as he could see the shelling was satisfactory, and to go ahead and dump it and get through with it. Such different claims and contentions were questions of fact for the jury. There appears to be sufficient evidence to sustain the verdict. This being so, we would not be justified in disturbing it.

5. Error is assigned because the trial court instructed the jury that "when the defendant company undertook to shell the corn, it was its duty to use ordinary care in the shelling; and by the term 'ordinary care' I mean such care as a person of ordinary prudence and skill would usually exercise under the circumstances." And again, that "if you are unable to say, after a fair and impartial consideration of the evidence in the case, under the instruction of the court, whether or not the corn was injured by the defendant in the shelling, so that it would not pop, by the failure of the defendant to exercise ordinary care, as hereinbefore defined, then the plaintiff cannot recover, because, as I have said, the burden of proof is upon the plaintiff to satisfy you, by a preponderance of the evidence, that it was so injured." The only criticism upon such portions of the charge is that they "fixed the criterion of ordinary care upon a person, instead of upon the mass or majority of people." In support of such contention counsel cite *Duthie v. Washburn*, 87 Wis. 233, and *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 118. In the first of these cases the language of the charge condemned contained the words "such care as people ordinarily use," "as a person would ordinarily use"; and in the other case the charge contained the words "such care as the ordinary person uses in the transaction of the ordinary affairs of life." Here the language of the charge is "such care as a person of *ordinary prudence and skill* would usually exercise under the circumstances." This language is a substantial

compliance with the rules sanctioned in the cases cited, as well as other and more recent cases in this court. *Olwell v. Milwaukee St. R. Co.* 92 Wis. 334; *Boelter v. Ross L. Co.* 103 Wis. 330; *Nass v. Schulz*, 105 Wis. 150, 151. In the case last cited the distinction suggested is pointed out, and numerous cases cited in support of it.

6. Error is assigned because the court refused to instruct the jury that, "if the plaintiff was present when the corn was shelled, and saw some of it, and had an opportunity to examine all of it, and afterwards took possession of all of it and removed it from the mill of the defendant, and then paid for the shelling, and made no objection to it on account of its being broken or injured in shelling, such taking possession of the corn and removing it was an acceptance of the corn, and he cannot recover in this action any damages for the broken condition that was apparent when he removed it." At the close of the charge to the jury the court was requested orally "to instruct the jury with reference to the acceptance" after the plaintiff had an opportunity to examine the corn, but declined on the ground that no written instruction on that question had been submitted to the court. After the jury had gone out with the officer, counsel for the defendant, upon the suggestion of the court, prepared and submitted to the court the written instruction so refused, and the jury subsequently returned into court for further instruction, when the court refused to give such written instruction, not upon the ground that it came too late, but upon the merits. We assume, for the purpose of this case, that such request to charge was made in time. The question recurs whether it was properly refused on the merits. There is evidence tending to prove that three bags of the corn so shelled by the defendant was in a proper condition for popping, and that the balance (some twenty-nine or thirty bags) was so cracked and broken that not more than one

eighth of it would pop; and that the plaintiff's examination was confined to the three bags which were good. The instruction so requested would have relieved the defendant of liability if the jury found that the plaintiff took possession of all the corn and removed it, and without objection paid for the shelling, even though he was entirely ignorant of the actual condition of the twenty-nine bags of the corn which the evidence on his part tended to prove were bad. In other words, if the jury found that the plaintiff "had an opportunity to examine all of" the corn, but failed to do so as to twenty-nine bags of the corn, yet that the consequences to him were the same as though he knew the actual condition of all the corn in each of the twenty-nine bags, when he paid for the shelling without objection. That is to say, the defendant was relieved of all liability for its negligence if the plaintiff failed to examine and ascertain the contents of every bag before paying for the shelling. True, the last part of the instruction only precluded the plaintiff from recovering "any damages for the broken condition that was *apparent* when he removed" the corn; and yet that was to be based upon a supposed finding of the jury that the plaintiff only "saw some" of the corn, and "had an opportunity" of examining all of it. One definition of the word "apparent" is "capable of being seen, or easily seen." The most that it could mean, as used in the instruction, is that the "broken condition" of the corn was "capable of being seen" by any one who examined the contents of every one of the twenty-nine bags that were bad. It is to be remembered that the corn belonged to the plaintiff. He had merely taken it to the defendant's mill to be shelled. He was bound to remove it whether it was properly shelled or not. The fact that he took possession of the corn, and removed it from the mill, therefore, is without significance. We must hold that the plaintiff was not precluded from recovery

merely by paying for the shelling under the circumstances named in the instruction. The motion to set aside the verdict and grant a new trial was properly denied.

By the Court.— The judgment of the circuit court is affirmed.

THE TOWN OF FULTON, Appellant, vs. POMEROY, Respondent.

October 16—November 5, 1901.

Highways: Obstruction: Res judicata: *Parties: Appeal: Opinion of supreme court.*

1. Where a town procured the bringing of an action in the name of the state to recover the forfeiture imposed by sec. 1326, Stats. 1898, for obstructing a highway by means of a fence, employed the attorneys, and paid the expenses, it is in effect a party thereto, and the judgment therein is conclusive upon it, in a subsequent proceeding in its own name to compel the removal of the fence as an encroachment, upon any question which was litigated and finally decided in the former action.
2. The opinion of the supreme court on appeal constitutes the findings of fact and conclusions of law upon which its judgment is based, and is to be considered and examined in determining what was finally decided in the case.
3. In an action to recover the forfeiture provided by sec. 1326, Stats. 1898, for obstructing a highway, the trial court found that there was no highway where the fence alleged to be an obstruction stood, but that the fence was on defendant's land. The judgment in favor of defendant was affirmed on appeal on the ground that, even upon the assumption that the fence stood in the highway, it did not constitute an obstruction, within the meaning of sec. 1326, but simply an encroachment under sec. 1330. *Held*, that the original findings were in no way set aside or impeached, and that the judgment as affirmed is conclusive that the *locus in quo* was not a part of the highway.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is a proceeding brought by the supervisors of the town of *Fulton* to secure the removal of an alleged encroach-

ment upon a highway in said town, under the provisions of secs. 1330–1337, Stats. 1898. The notice required by sec. 1330 was duly served upon the defendant, who thereupon served on the supervisors a notice denying the encroachment, and application was then made to a justice of the peace for the appointment of a jury to try the question of encroachment, which jury, after trial of the question, found that an encroachment had been made. Judgment upon such finding was entered by the justice, as provided by sec. 1335, Stats. 1898, and the defendant appealed to the circuit court, where he was permitted to file an amended answer, in which he set forth as an additional defense the record and judgment in the case of *State v. Pomeroy*, which was appealed to this court, and which appears in 73 Wis. 664, and claimed that the judgment in that case was *res adjudicata* of the issues in the present case.

Upon the trial it was stipulated by the parties that the trial, so far as the plea of former adjudication was concerned, should be by the court without a jury, and that, in case that the court should hold that said plea was good and the facts constituted a bar to this action, the defendant might have judgment against the plaintiff upon the merits. It was conceded upon the trial that the action of *State v. Pomeroy*, 73 Wis. 664, was commenced at the request of the then supervisors of the town of *Fulton*, acting as the town board, and was prosecuted by such board, and that the attorney's fees for the plaintiff's attorneys in that action were paid by the town of *Fulton*. The record of that action in the circuit court for Rock county, as well as the opinion and decision of this court, were offered in evidence and received. Some oral evidence was given as to the issues that were in fact tried in that action, and at the close of the evidence the court found that the premises described in the order of removal in this action as being part of the highway are the same premises described in the previous action above

named, and that the fence described in that action is the same fence alleged to be an encroachment in the present action, and that the highway claimed to have been described in that action is the same highway claimed to have been encroached upon in this action, and that the previous action was prosecuted by the said town board, and the fees of the plaintiff's attorneys paid by them.

As conclusions of law the court found that the plaintiff in this action is bound by the judgment in the previous action, and that said judgment is a bar to the maintenance of this action, because the same is *res adjudicata* of the issues in the present action. Upon these findings judgment was entered reversing the judgment in the justice's court and dismissing the action with costs, and from that judgment the plaintiff appeals.

For the appellant there was a brief by *Fethers, Jeffris & Mouat*, and oral argument by *M. G. Jeffris* and *M. O. Mouat*. They contended, *inter alia*, that "it cannot well be urged that a question was decided in a case when the *opinion* expressly declares that the question was not necessary to be decided." *Smith v. C., M. & St. P. R. Co.* 83 Wis. 271, 275. Extrinsic evidence is admissible to show what was in fact litigated. Jones, Ev. § 616; *Gray v. Tyler*, 40 Wis. 579. This court will go to the "*opinion of the court*" to determine whether or not questions are *res adjudicata*. *Yates v. Shepardson*, 39 Wis. 173; *Hood v. Hood*, 110 Mass. 463; *Esterbrook v. Savage*, 21 Hun, 145–148; *Noonan v. Orton*, 31 Wis. 265–274; *Whitney v. Traynor*, 76 Wis. 628–630; *Russell v. Place*, 94 U. S. 606; *Fuller-Warren Co. v. Harter*, 110 Wis. 80; *Griffin v. Seymour*, 15 Iowa, 30; *Hughes v. U. S.* 4 Wall. 232.

For the respondent there was a brief by *Sutherland & Nolan*, attorneys, and *Charles E. Pierce*, of counsel, and oral argument by *Mr. Geo. G. Sutherland* and *Mr. Pierce*. They argued, among other things, that to determine what is de-

cided in any given case we must look to the judgment of the court, not to the reasons given by the judges therefor. *Ean v. C., M. & St. P. R. Co.* 101 Wis. 166, 170, 171; *Bell v. Peterson*, 105 Wis. 607, 614, 615; *Harmon v. Auditor*, 123 Ill. 122; *Grunert v. Spalding*, 104 Wis. 193, 214, 216, 218; *Braun v. Wis. R. Co.* 92 Wis. 245, 251; *Matter of Broderick*, 25 Misc. (N. Y.), 534, and cases cited; *Huelett v. Wood*, 67 N. Y. 394, 399; *Snebley v. Conner*, 78 N. Y. 218, 219; *Clarke v. Lourie*, 82 N. Y. 580, 581; *Randall v. N. Y. E. R. Co.* 149 N. Y. 211, 213; *Robinson v. N. Y., L. E. & W. R. Co.* 64 Hun, 41; *Finch v. Hollinger*, 46 Iowa, 216, 217; *Smith v. Armstrong*, 25 Wis. 517, 520, 521; *Smith v. C., M. & St. P. R. Co.* 83 Wis. 271; *Goodenow v. Litchfield*, 59 Iowa, 226; *Trescott v. Barnes*, 51 Iowa, 409; *Hart v. Moulton*, 104 Wis. 349–353; *Case v. Hoffman*, 100 Wis. 314. It was and is necessary to enable the plaintiff to maintain this, or to have maintained the former, action to prove that the *locus in quo* was not the private property of the defendant but a highway. And that finding in a judgment of the court below was affirmed, and cannot again be litigated by the plaintiff. *Ford v. Ford*, 80 Wis. 565; *Braun v. Wis. R. Co.* 92 Wis. 245; *Ean v. C., M. & St. P. R. Co.* 101 Wis. 166, 170, 171; *Grunert v. Spalding*, 104 Wis. 193; *Bell v. Peterson*, 105 Wis. 614, 616; *Harmon v. Auditor*, 123 Ill. 122; *Att'y Gen. v. C. & E. R. Co.* 112 Ill. 520; *Shankland v. Shankland*, 115 Ill. 526; *Iowa Co. v. Mineral Point R. Co.* 24 Wis. 124; *Wilson's Ex'r v. Deen*, 121 U. S. 525. In the former action, although the state was the party, the town of *Fulton* conducted the suit, made the complaint, and hired the attorneys, so that in every sense of the word the parties to the former action and this action are the same. *People ex rel. Bryant v. Holladay*, 93 Cal. 241; *People v. Holladay*, 102 Cal. 661; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 628; 2 Van Fleet, Former Adjudication, 1151; *People ex rel. Robarts v. Beaudry*, 91 Cal. 213; *Clark v. Wolf*, 29 Iowa, 197; *Detroit v. Ellis*, 103

Mich. 612; *Citizens' H. R. Co. v. Belleville*, 47 Ill. App. 388; *Dickinson v. Eichorn*, 78 Iowa, 710; *Zimmerman v. Savage*, 145 Ind. 124; *Bank of Ky. v. Stone*, 88 Fed. Rep. 383, 393.

WINSLOW, J. This is a statutory proceeding by the town of *Fulton* to compel the removal of defendant's fence on the ground that it is an encroachment upon a highway, and it is claimed on the part of the defendant that in a previous action brought in the name of the state to recover a penalty for obstructing the highway, it was finally determined that there was no highway where the fence stands, and that this determination is *res adjudicata* in the present case. The question of the effect of the previous judgment after its affirmance by this court (*State v. Pomeroy*, 73 Wis. 664) is really the only serious question in the case.

Although that action was brought in the name of the state, and the present action is prosecuted by the town, there can be no doubt that the general public is the real party plaintiff in both cases, and hence that the judgment in the former action is conclusive upon the plaintiff in the present case upon any question arising in the present case which was litigated and finally decided in that action. The questions in both cases being public questions, the town was in effect a party to the former action. It procured the bringing of that action, employed the attorneys, and paid the expenses; and it is unquestionably bound by the result to the same extent as though it had been named as a party. 2 Van Fleet, Former Adjudication, 1151. It seems equally clear that the opinion of this court upon the appeal in the former case is a part of the record, and is to be considered and examined in determining the question as to what was finally decided in that case. The statute provides in express terms (Stats. 1898, sec. 2410) that the "opinion or decision of the supreme court . . . shall constitute and be held a part of the record in the action." The reason of the rule is manifest.

The opinion of this court is not a mere statement of reasons, like an opinion of the trial court, but constitutes the findings of fact and conclusions of law upon which this court bases its judgment; it is a *decision* as well as an opinion, and is the only paper from which it can be ascertained what are the conclusions of this court either upon the facts or upon the law.

These preliminary questions, which seem to have been raised upon the trial below, but were not seriously mooted upon the argument in this court, having been disposed of, we proceed to the question of the effect of the previous judgment upon the rights of the parties in the present case.

It appears from the oral evidence that the fence involved in the former action was the same fence which is claimed to be an encroachment in this action. The record of that action shows that it was brought to recover the forfeiture provided by sec. 1326, Stats. 1898, for obstructing the highway; that the defendant answered, denying the existence of any highway where the fence stands, on the ground of adverse possession for more than twenty years; that the action was tried by the court; and that the court found that there was no highway where the fence stands, but that the same stood upon the defendant's land, and judgment was thereupon rendered for defendant. From this judgment the plaintiff appealed to this court, and the judgment was affirmed. *State v. Pomeroy*, 73 Wis. 664. In affirming the judgment this court expressed no opinion upon the question whether the fence stood in the highway or not, but simply assumed, for the purposes of the appeal, that the *locus in quo* was a part of the highway, and then proceeded to decide that, even upon this assumption, the fence did not constitute an obstruction, within the meaning of sec. 1326, but simply an encroachment, under sec. 1330, and hence that the judgment should be affirmed upon that ground.

The appellant claims that by the judgment of affirmance, based upon the ground stated, the finding of fact of the circuit court to the effect that the *locus in quo* was not a highway has been eliminated from the case, and that the only question finally decided was that the fence was not an obstruction within the meaning of the law.

We are unable to agree with this contention. The judgment for the defendant in the circuit court, based upon the finding of no highway, was clearly *res adjudicata* between the parties and their privies until the finding was set aside by the court that made it, or by some tribunal having appellate jurisdiction. This must be conceded. Even an appeal does not deprive a judgment of its effect as a bar to another action. It may be pleaded and relied upon pending such appeal with the same effect as if no appeal had been taken. *Smith v. Schreiner*, 86 Wis. 19; *Richter v. Leiby*, 99 Wis. 512; *State ex rel. C. & N. W. R. Co. v. Burnell*, 102 Wis. 232. The effect of the finding and judgment as a bar was therefore not superseded by the appeal, and the bar remained up to the very moment that the judgment was affirmed by this court. If superseded or set aside by anything, it must have been by that judgment, construed in the light of the opinion. But neither the judgment nor the opinion attempted to set aside anything which had been decided below. Had the opinion discussed the question of highway, and arrived at the conclusion that the finding below was contrary to the evidence and there was in fact a highway where the fence stood, but that the fence did not constitute an obstruction, and hence that the judgment was right, a very different question would have been presented. But nothing of the kind appears. The finding of no highway was in no respect shaken. The court simply said that, conceding for the purposes of the appeal that the appellant's contention as to the highway is correct, still there is no obstruction and can be no recovery. The case then went back

to the trial court with simply, in effect, an additional finding upon which the judgment for the defendant thereafter rested, but with the original finding not set aside or impeached.

The principle that a general affirmance of a judgment, based upon the findings of fact made by the trial court, leaves those findings intact unless they are specifically set aside in the decision or opinion, seems reasonable as an original proposition, but we are not without authority upon the question. Mr. Van Fleet, in his work on Former Adjudication, at page 145, expresses the idea thus:

"If a cause is decided upon the merits, the fact that upon appeal the judgment is affirmed upon grounds which do not touch the merits does not remove the bar of *res judicata*."

To this doctrine is cited *Trescott v. Barnes*, 51 Iowa, 409. That was an action upon promissory notes given upon the purchase of land, and the defense was rescission. It was shown that in a former action upon one of the notes given for the same land the same defense had been pleaded, the action tried, and judgment rendered for the plaintiff upon the merits, which judgment was affirmed upon appeal to the supreme court simply on the ground that it was not triable *de novo* in that court, and that no errors had been assigned. The judgment so affirmed was held to be a complete bar, although the merits were not considered in the supreme court, because there had been a decision on the merits in the trial court, which stood unreversed.

In *Finch v. Hollinger*, 46 Iowa, 216, the plaintiff brought an action of conversion for a number of steers. It appeared that he claimed ownership as chattel mortgagee, and that he had previously brought a replevin action for the same steers, in which he had been defeated. In the replevin action the defendant (who was an officer and held the steers under an execution against the original owner) defended on two grounds: first, that he had been served with no notice

in writing by the plaintiff as required by a certain section of the Iowa Code; and, second, that the plaintiff's mortgage was fraudulent and void as to creditors of the mortgagor. After trial in the replevin action, a general judgment was rendered for the defendant, and upon appeal that judgment was affirmed by the supreme court upon the sole ground of the want of notice. The court held that such an affirmance was an affirmance with respect to all the issues decided below, and that the judgment was *res adjudicata* upon all of such issues.

To the same effect is *People v. Skidmore*, 27 Cal. 287. This court practically adopted that view in *Smith v. C., M. & St. P. R. Co.* 83 Wis. 271, in which case an intimation to the contrary in *Gray v. Tyler*, 40 Wis. 579, was disapproved.

By the Court.— Judgment affirmed.

MARSHALL and DODGE, JJ., dissent.

THE STATE EX REL. POSBRIG, Appellant, vs. DAUBNER, Respondent.

October 16 — November 5, 1901.

(1) *Justices' courts: Jurisdiction: Amendment of pleading: Adjournment: Consent.* (2) Certiorari: *When writ may be quashed.*

1. Where an amendment of the complaint is allowed upon terms in justice's court in violation of subd. 11, sec. 3626, Stats. 1898 (prohibiting the allowance of an amendment after a witness is sworn when an adjournment will thereby be made necessary), the justice does not lose jurisdiction if the defendant accepts the terms and consents to the adjournment.
2. When the return to a writ of *certiorari* shows the proceedings to have been with full jurisdiction and regular, the writ may be quashed.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The State ex rel. Posbrig vs. Daubner.

An action was commenced in justice's court December 6, 1899, by Chas. M. Kellar against *Theodore Posbrig* to recover on a promissory note, returnable December 20, 1899. The plaintiff filed a written complaint, in which the defendant was named "Theodore Posburg." The defendant appeared and answered, and the case was adjourned from time to time until March 12, 1900. At that date both parties were ready for trial. The plaintiff swore a witness, whereupon the defendant objected to any evidence under the complaint, for the reason that it failed to state a cause of action against "*Theodore Posbrig*," but did state a cause of action against "Theodore Posburg." The plaintiff asked leave to amend by making the change in the name of defendant. The defendant made an affidavit of surprise, but, after some consideration, the justice permitted the amendment, on condition that plaintiff pay defendant $5.40, the cost of one day's attendance of his witnesses. This sum was paid to defendant's attorney. The following entry appears in the justice's docket:

"By consent of parties, this case is adjourned to March 21, 1900, at 10 o'clock a. m., at my office in the city of Waukesha, Wisconsin; said adjournment having been made necessary by the allowance of said amendment."

On the adjourned day the defendant failed to appear, and plaintiff took judgment for the amount of the note and costs. Thereafter the defendant sued out a writ of *certiorari* addressed to the justice, claiming that he lost jurisdiction of the case by allowing the amendment of the complaint after a witness had been sworn on the trial. Due return to the writ was made by the justice, and after a hearing on the merits, on motion of the attorney for the justice, a judgment was entered by the circuit court quashing the writ and for costs. From this judgment the relator has taken this appeal.

For the appellant there was a brief by *Tullar & Lockney*, and oral argument by *D. S. Tullar*.

Simon Gillen, for the respondent.

BARDEEN, J. Subd. 11, sec. 3626, Stats. 1898, authorizes a justice of the peace to permit pleadings to be amended, when by such amendment substantial justice will be promoted, but provides that "no amendment shall be allowed after a witness is sworn on a trial when an adjournment thereby will be made necessary." In this case the justice permitted an amendment of plaintiff's complaint to be made on condition that plaintiff pay one day's attendance of defendant's witnesses. This amount was paid, and the justice's docket shows that the defendant then consented to an adjournment. Such consent renders it unnecessary to determine what would have been the effect of the allowance of such amendment upon the question of the jurisdiction of such justice. Clearly, the justice had no right to permit the amendment when an adjournment of the case was thereby rendered necessary. But having granted the amendment on terms, and the defendant having accepted such terms and consented to the adjournment, there was certainly no loss of jurisdiction. Even if it be considered that the justice lost jurisdiction of the case by the allowance of the amendment, still a subsequent consent to the adjournment purged the case of any fault under that ruling, and left it to proceed the same as if it had never been made. Under these circumstances, there was no merit in defendant's writ, and the judgment of the justice should have been affirmed. But, instead of doing this, the court entered a judgment quashing the writ. The appellant claims this to have been erroneous. Whatever may have been the confusion among the earlier decisions of this court, it is now well settled that, when the return to the writ shows the proceedings were with full jurisdiction and regularity, it may be quashed. *State ex rel. Gray v. Oconomowoc*, 104 Wis. 622, and cases cited on page 628.

By the Court.— The judgment is affirmed.

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1. The assignee of a claim, holding the legal title by a transfer valid as against his assignor, is the "real party in interest" and the proper party to sue thereon, under sec. 2605, Stats. 1898; and the fact that such transfer is colorable only is immaterial unless the rights of creditors are involved or the right to interpose some defense or counterclaim supposed to be cut off by the assignment. *Chase v. Dodge,* 70

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2. A cause of action at law for damages to the plaintiff growing out of an unlawful combination cannot, under sec. 2647, Stats. 1898, be united with a cause of action in equity in favor of the plaintiff and others similarly situated to restrain further operations by the combination, since both causes of action do not affect all the parties. *Hawarden v. Youghiogheny & L. C. Co.* 545

Consolidation of actions.

3. An action appealed from justice's court and, under sec. 3768, Stats. 1898, triable in the circuit court "as actions originally brought there," may be consolidated, under sec. 2792, with an action com-

menced in the circuit court, notwithstanding the provisions of secs. 3766, 3770, in respect to the dismissal of the appeal if not brought to a hearing within the time there specified. *Lauterbach v. Netzo*, 322

4. Where in such a case the consolidated action was brought to a hearing within the time limited by sec. 3766, the respondent could not be prejudiced by the consolidation. *Ibid.*

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Of city charter by ordinance adopting parts of general charter. See MUNICIPAL CORPORATIONS, 1.

ANIMALS.

See MUNICIPAL CORPORATIONS, 4, 5.

1. Where one purpose of a municipal ordinance prohibiting the running at large of animals was to protect persons from injury, its violation is ground for a claim of negligence in an action for personal injury inflicted by a horse so running at large. *Decker v. McSorley*, 91

2. Evidence that the horse inflicting such injury had frequently been at large in the streets was admissible as tending to show that it was at large with the knowledge and assent or permission of the defendant, its owner. *Ibid.*

APPEAL AND ERROR.

From what appeal may be taken.

1. The decision of the circuit court upon an appeal from the county court, though in form an order, is a judgment and appealable as such. *Swarthout v. Swarthout*, 102

2. A proceeding by *mandamus* is a civil action, and the awarding of a peremptory writ a final judgment, within the meaning of the appeal statutes. *State ex rel. Court of Honor v. Giljohann*, 377

3. An order refusing to dismiss an action for noncompliance with sec. 2632, Stats. 1898 (relating to payment of the state tax, etc.), does not prevent a judgment from which an appeal may be taken, and is therefore not appealable. *Benolkin v. Guthrie*, 554

Parties: Who will be heard.

4. Where judgment was entered against two defendants and one only appealed, the other cannot on such appeal be heard to attack the judgment as against him. *Gager v. Paul*, 638

Record: Bill of exceptions. See APPEAL, 15, 17.

5. Papers purporting to be a bill of exceptions, filed in this court but not attached to the record nor bearing the certificate of the clerk of the trial court, cannot be considered. *Rooney v. State,* 125

6. In the absence of a certificate of the trial judge that the bill of exceptions contains all the evidence, it will be presumed that there was sufficient evidence to sustain the verdict. *Ibid.*

7. Steps taken in the trial court which do not properly become a matter of record can come before this court only by a bill of exceptions settled and authenticated as such by the trial judge. A declaration of the trial judge, appended to an order sustaining a demurrer, to the effect that the order was excepted to on certain grounds specified, is no proper part of the record on appeal and cannot be considered. *Finney v. Guy,* 296

8. An order refusing leave to amend the answer, being discretionary, will not be reviewed on appeal from the judgment, where the record does not show upon what the court acted in making such order. *Roberts v. Weadock,* 488

Same: Withdrawal for correction.

9. After a cause before the supreme court has been placed upon the assignment for argument, leave will not be granted to withdraw the record and return it to the trial court for the purpose of obtaining a certificate that the bill of exceptions contains all the evidence. *Barlass v. Kargus,* 611

Same: Motion to strike out: Withdrawal.

10. On the same day respondent served a notice of motion to dismiss an appeal and a notice of motion to strike certain papers from the record. Two days thereafter he served a notice that "the annexed notice of motion to dismiss the appeal . . . a copy of which is hereto annexed is hereby withdrawn." Annexed thereto were copies of the notice and motion to strike out. *Held,* that the motion to strike out was withdrawn. *Finney v. Guy,* 296

Same: Findings of trial court: "Decision."

11. The formal findings of the trial court in this case containing conclusions of law and being silent as to the real issue of fact litigated, but a written "decision" having been filed, signed "by the court," passing to some extent upon that issue, and the appellant having filed exceptions to various parts thereof, such decision is treated on appeal as a finding of fact. *Duncan v. Duncan,* 75

Review: Intermediate orders: Taxation of costs. See APPEAL, 8.

12. Where an action had been removed from a justice of the peace on the ground of prejudice, and then taken by appeal to the circuit court, an order of the circuit court permitting the justice to attach his signature *nunc pro tunc* to the jurat of the affidavit of prejudice is reviewable on appeal from the judgment of the circuit court, under sec. 3070, Stats. 1898, although not brought into the record by a bill of exceptions. *Hewitt v. Follett,* 51 Wis. 264, followed. *Morrell v. Glasspoole,* 292

13. The taxation of costs in the trial court is not reviewable by the supreme court where there was no objection or exception to any item thereof. *Lauterbach v. Netzo,* 322

Same: Errors available.

14. A party who in his pleading expressly alleged that a will was duly

admitted to probate cannot on appeal allege as error insufficiency of proof of the probate thereof. *Duncan v. Duncan*, 75

15. An objection made to the introduction of a record in evidence, on the ground that the whole of it was not offered, is not available on appeal where, when asked by the trial court what parts of the record had not been offered, appellant specified none, and where the record as offered is not brought before this court in the bill of exceptions. *Lauterbach v. Netzo*, 326

Same: Exceptions: Mistake.

16. A general exception to a finding containing several propositions of fact, some of which are either undisputed or are clearly supported by the evidence, is insufficient. *Ingersoll v. Seatoft*, 461

17. Where the record shows two general exceptions to the ninth finding of fact and none to the tenth, all of the other findings being excepted to, the supreme court on appeal will not disregard the record and consider one of said exceptions as directed against the tenth finding. *Ibid.*

Same: Questions of fact.

18. Upon evidence fairly justifying either of two inferences, the decision of the trial court must control. *Spuhr v. Kolb*, 119

19. Where the evidence is so uncertain and confused as to render the proper inferences extremely doubtful, the decision of the trial court is entitled to some weight in determining the correctness of of its ruling in taking the case from the jury. *Lauterbach v. Netzo*, 326

Affirmance and reversal: Material and immaterial errors. See DECEIT, 12. CRIMINAL LAW, 13, 19, 20. EJECTMENT, 6. HIGHWAYS, 1. MUNICIPAL CORPORATIONS, 13, 18. PRINCIPAL AND AGENT, 1. SLANDER, 1, 3, 9. TRIAL, 7–10.

20. In a case tried by the court a reversal cannot result from error in the admission of evidence. *Duncan v. Duncan*, 75

21. Objectionable remarks in argument to the jury, which were of such a character that they might easily have been remedied had the attention of the trial court been called to them when made, but were not then objected to and are brought into the record only by affidavit upon a motion for a new trial, will not work a reversal. *Hacker v. Heiney*, 313

22. In an action tried by the court the granting of a nonsuit without making findings of fact cannot work a reversal of the judgment where it was consented to by both parties in the trial court and is not assigned as error on the appeal. *Barlass v. Kargus*, 611

23. Where evidence received "subject to objection" in an action tried by the court is included in the bill of exceptions it is before the appellate court for all purposes, and the failure to receive it absolutely cannot be ground for reversal. *Ibid.*

24. Refusal of the trial court to allow plaintiff to introduce additional evidence after a motion for nonsuit was made will not be held error unless it was an abuse of discretion. *Ibid.*

Judgment: Res judicata: Opinion. See HIGHWAYS, 8.

25. Where an order overruling a demurrer is reversed and the cause remanded "for further proceedings according to law," a judgment subsequently entered by the trial court does not become the judgment of the supreme court, but is subject to review on appeal. *Finney v. Guy*, 296

26. A decision on appeal that a complaint fails to state any cause of action must control both the trial court and this court at all subsequent stages of the same case, no matter what new or different arguments may be urged against its correctness. *Ibid.*

27. A decision as to the amount of damages recoverable on a given state of facts in a particular case, when once rendered in the supreme court is *res judicata* and absolutely controlling in such case, the same as a decision upon any other question. *Collins v. Janesville,* 848

28. The opinion of the supreme court on appeal constitutes the findings of fact and conclusions of law upon which its judgment is based, and is to be considered and examined in determining what was finally decided in the case. *Fulton v. Pomeroy,* 663

Printed case and briefs: Compliance with rules: Taxation of costs.

29. Where the most important question raised on a writ of error was whether the court erred in directing a nonsuit, the printed case should contain an abstract of the evidence of all the witnesses whose testimony has a substantial bearing upon the plaintiff's contentions. *Lauterbach v. Netzo.* 826

30. No direction as to the taxation of costs having been given when a case was decided, the clerk properly refused to pass upon the questions whether the printed case was made up in compliance with the rules and whether a reply brief was necessary. *Collins v. Janesville,* 848

Appeal from county court. See APPEAL, 1.

Appeal from justices' courts. See ACTION, 3, 4. JUSTICES' COURTS, 4.

Appeal from county board: Bond: Sufficiency.

31. An instrument in writing, under seal and witnessed, reciting that the principal obligor has appealed to the circuit court from the disallowance of his claim against a county by the county board, and stating that the obligors, as principal and surety, "do hereby undertake that the said appellant will faithfully prosecute said appeal and pay all costs that shall be adjudged against the appellant," was approved by the county clerk. *Held,* that although the instrument was not technically a bond and did not in form run to the county, it was a substantial compliance with sec. 683, Stats. 1898 (requiring the appellant in such a case to execute "a bond to such county, with sufficient surety, conditioned for the prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant"), and was therefore sufficient to confer upon the circuit court jurisdiction of the appeal. *Ellis v. Barron Co.* 576

Appeal from city council: Pleading: Undertaking. See MUNICIPAL CORPORATIONS, 9.

32. Where pursuant to law an appeal has been taken to the circuit court from the disallowance of a claim by the common council of a city, it is not necessary that issue should be joined in order that the case may be noticed for trial. If no formal pleadings are required by the trial court, the claim serves as a complaint and the law implies the fiction of a general denial. *Davey v. Janesville,* 628

33. Sec. 925–60, Stats. 1898, provides for the giving of an undertaking on appeal to the circuit court from the disallowance of a claim against a city by the common council, "conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant." *Held,* that an under-

taking which followed the exact words of the statute, but added after the word "appellant" the words "by the court," was sufficient. *Ibid.*

Appeal to grand lodge. See INSURANCE, 9.

APPEARANCE. See JUSTICES' COURTS, 2.

ARBITRATION AND AWARD.

1. An action having been brought for an accounting and to enforce an equitable claim to land under a contract by which plaintiff was to work for defendant upon a certain farm until it should be paid for by defendant and was then to receive a deed of one third of the farm, the parties submitted the controversy to arbitrators, and plaintiff, for the purposes of the arbitration, and finally if judgment should be entered on the award, waived all claim that such contract might give him to the farm and agreed to accept a money award only. *Held*, that such submission was not void under sec. 3545, Stats. 1898, which provides that "no such submission shall be made respecting the claim of any person to any estate in fee or for life to real estate." *McCord v. Flynn*, 78

2. The parties having further agreed, in the submission to arbitrators, that a judgment of the court in which the action was brought should be rendered upon the award, the arbitrators had power to order or determine that plaintiff should have judgment. *Ibid.*

3. Where arbitrators have exercised, or attempted to exercise, their judgment upon the questions submitted to them, their award in respect thereto cannot be disturbed for mere error of judgment as to the law or the facts. *Ibid.*

4. A contract provided that plaintiff should work for defendant upon a farm purchased by the latter until it should be paid for, and should then receive a deed of one third of the farm as compensation; also that all proceeds of the farm and all other lands owned by defendant, over and above the running expenses and the maintenance of defendant and his family and plaintiff, should be applied to payment for said farm. The respective claims of the parties under such contract were submitted to arbitrators, who determined that in an accounting defendant was not entitled to credit for services of his sister who lived with him as a member of his family. *Held*, that such determination was not subject to revision by the court. *Ibid.*

5. But where such arbitrators, in making an award in plaintiff's favor of a sum intended to represent his interest in the farm, credited him with a share of fees received by defendant as town clerk during the continuance of the contract, the court properly modified the award by deducting the amount so credited, since that was a matter not covered by the contract nor submitted to the arbitrators. *Ibid.*

6. As a general rule, after arbitrators have made and delivered their award they have no power to rejudge the case and alter such award; but the award may be corrected so as to allow one party a credit which by mere oversight the arbitrators at first omitted to allow; and an order of the court treating the award as so corrected will be regarded as an order so modifying it, under sec. 3553, Stats. 1898. *Ibid.*

ASSESSMENT of damages, etc. See MUNICIPAL CORPORATIONS, 8, 9.

ASSESSMENTS. See INSURANCE, 4, 7, 8, 10.
ASSIGNMENT of cause of action. See ACTION, 1.
ASSUMPTION of debts, etc. See RAILROADS, 3. VENDOR AND PURCHASER.

ATTACHMENT.

See REPLEVIN.

1. Where an officer levies upon property exempt by plain provisions of the statute he commits an actionable wrong in respect thereto as soon as he deprives the debtor thereof. *Stern v. Riches*, 591
2. Under secs. 2982, 2982*a*, Stats. 1898, an officer holding a writ of attachment may levy upon an entire stock of goods belonging to the defendant, subject to his exemptions, and retain possession thereof for a reasonable length of time for the making of an inventory and appraisement and the selection of exemptions, but if he unreasonably deprives the defendant of an opportunity to make a selection of his exempt property, or refuses to recognize his right thereto upon the particular articles being designated and demanded, he becomes a trespasser *ab initio*. *Ibid.*

ATTORNEYS AT LAW.

See APPEAL, 21. SLANDER, 9. TRIAL, 7.

1. The relationship between attorney and client does not render the former incapable of contracting with the latter in respect to the subject matter of the employment, or with the latter's adversary, where a suit is pending between him and the client, though such dealings are regarded by courts with suspicion and are not sustained against the will of the client if his interests have been thereby sacrificed in any respect. *Vanasse v. Reid*, 303
2. If an attorney deals with his client or with a person opposed to such client in respect to the subject matter of the attorney's employment, and such attorney's conduct in so dealing is called in question by his employer, the burden is on such attorney to show that the transaction was in no way to the disadvantage of his client, that his conduct was open and honest, that he fully informed his client of all the facts material for him to know, and that he left nothing undone which he could reasonably have done to promote such client's interests. *Ibid.*

BANKS AND BANKING.

See BILLS AND NOTES, 2-4.

1. The acceptance of a deposit by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his money, although there may have been no intent on the part of the officers of the bank to cheat or defraud him in particular. *Hyland v. Roe*, 361
2. On the day before an insolvent bank closed its doors, the payee of a check on another bank delivered it to the insolvent bank and received a part of the amount in cash and a certificate of deposit for the balance. The check was sent to the drawee bank, which, by order of the insolvent bank, transmitted to the credit of the latter the amount which had been paid in cash but, at the request of the payee, held the balance for a time. Afterwards such balance was, paid over to the receiver of the insolvent bank. *Held*, that the

fund thus paid over was sufficiently identified as the proceeds of the check to warrant its recovery by the payee upon rescission of the transaction for fraud. *Ibid.*

8. A petition, in such case, that the receiver be required to pay over said fund to the payee of the check was not insufficient, on demurrer, because it failed to allege a readiness to return the amount of the cash received, since the insolvent bank had in turn received that amount; but, the certificate of deposit being a sufficient foundation for a claim for dividends, failure to tender it back or to offer to do equity in respect thereto rendered the petition demurrable. *Ibid.*

4. The statutory liability of stockholders in a bank under sec. 47 of the banking act may be enforced against the estate of a deceased stockholder in an action by creditors to wind up the affairs of the bank, and need not be presented as a claim in the settlement of the estate in the county court; and if the estate has been distributed the residuary legatee will be liable, and in case of his death his personal representative. *Gager v. Paul*, 638

5. Under sec. 16 of the banking act (providing that a person holding stock in any bank who shall sell or transfer the same "shall be held and remain for the term of six months from and after such sale . . . personally liable to the amount of the stock so as aforesaid sold . . . for the payment of all debts and liabilities of such bank" existing at the time of such sale), the transferrer's liability is limited to those who were creditors at the time of the transfer, and the action to enforce such liability must be commenced against him within the six months so limited. The commencement of an action to wind up the affairs of the bank within such six months, to which however the person so liable was not made a party within the required time, is insufficient to prevent the running of the statute. *Ibid.*

6. A stockholder in a banking corporation received certificates of stock purporting to be full-paid, for which he actually paid but a fraction of the par value. Subsequently his liability for the balance was in form discharged by the application to its payment of an entirely fictitious accumulation of profits, and an increase in the capital stock was paid for in the same manner. *Held*, that as between the stockholder and the bank, the latter could not recover the unpaid portion of the capital stock, but that the transaction constituted a fraud upon the creditors of the bank and gave rise to a right of action in their favor, enforceable only in an equitable action to which the bank is a party. *Ibid.*

7. The cause of action in favor of the creditors of the bank in such a case being of such a nature that it could not be adjudicated in the county court in probate proceedings, their rights against a deceased stockholder are not foreclosed by failure to present their claim in that court, but after the settlement of his estate they may enforce them against his residuary legatee. *Ibid.*

8. The liability of a stockholder in an insolvent bank to refund dividends paid him in violation of sec. 40 of the banking act is to the corporation and enforceable by it; but a stockholder or creditor may invoke the aid of a court of equity to compel restitution, when the corporation will not act. *Ibid.*

9. The right of an insolvent bank, whose affairs are being wound up at the suit of creditors, to recover dividends paid a deceased stockholder in violation of sec. 40 of the banking act, is one provable in

county court, and cannot be enforced against next of kin or legatees if opportunity to prove it against the estate was duly given. *Ibid.*

10. In proceedings to recover from the residuary legatee of a deceased stockholder in an insolvent bank a balance due on shares of stock derived from her testator, there was evidence that the testator gave a stock note for the shares but no evidence as to what became of it. There was evidence, however, that he never paid more than sixty per cent. on his shares, and that some years later a resolution was passed attempting to pay the remaining forty per cent. out of a fictitious accumulation of profits. *Held*, sufficient to rebut the presumption that the whole of the stock note had been paid. *Ibid.*

BENEFIT SOCIETIES. See INSURANCE, 1, 9-14.

BILL OF EXCEPTIONS. See APPEAL, 5-9, 12, 15, 17, 23.

BILLS AND NOTES.

See BANKS, 10. PRINCIPAL AND AGENT, 8.

1. The general rule is that if a person, with knowledge of facts which will defeat a promissory note in the hands of the payee, purchases it from a *bona fide* holder thereof, he may recover thereon upon the strength of such *bona fides;* but that rule does not apply to a purchaser who is the payee of the note. If he sells such paper to an innocent third person and repurchases it for value, he does not thereby become possessed of any better right as against the maker than he possessed in the first instance. *Andrews v. Robertson*, 334

2. In an action by a bank upon promissory notes given to it, uncontradicted evidence that one of the makers stated to the cashier, at the time the notes were executed and when all the parties were present, that he was going to "back up" and "stand behind" the other makers, and that the cashier understood that such maker was signing merely as security, is *held* to show that he was a surety merely, although by reason of the form of the notes he made himself absolutely liable in the first instance. *Omaha Nat. Bank v. Johnson*, 372

3. When notes which one of the makers had signed as surety became due, new notes with specified times of payment were taken, interest thereon paid in advance, and the old notes canceled and given up,—all without the knowledge or consent of the surety. *Held*, that the surety was released from liability. *Ibid.*

4. The fact that the renewal notes in such case were signed in the name of the K. & D. Coal Co., instead of in the individual names of K. and D. (who did business in the form of said corporation), is immaterial, where it appears that they were given to represent the same indebtedness as the original notes. *Ibid.*

BONDS. See APPEAL, 31. BUILDING CONTRACTS. CORPORATIONS, 2, 3.

BRIDGES.

Crossing with steam engines: Negligence.

1. The requirement of ch. 197, Laws of 1899, in respect to the spanning of a bridge, before crossing with a steam engine, "with hardwood planks at least two inches thick and twelve inches wide, so that the engine shall rest thereon in crossing," is sufficiently complied with if the tracks upon which the wheels of the engine run are of

the required thickness and width, though made up of narrower planks laid side by side. *Walker v. Ontario*, 113

2. Failure to comply with such requirement of the statute is not a defense to an action for injuries caused by the breaking down of a bridge, unless there was some direct causal relation between such failure and the accident. *Ibid.*

3. Ch. 197. Laws of 1899, impliedly justifies the use of highways and bridges by traction engines, without liability on the part of owners, if they comply with its requirements; and *it would seem* that the proper authorities are under obligation to keep up their highways and bridges to a standard of usefulness and safety sufficient for such use. *Ibid.*

4. Where the defective and rotten condition of the stringers and braces of a bridge was not so obvious as to be discoverable by ordinary observation, there was no conclusive inference of contributory negligence on the part of a person who was injured by the breaking of the bridge while he was attempting to cross it with a traction engine weighing 9,500 pounds, although he had passed over the bridge daily, knew it was twelve or thirteen years old, and did not test the structure by boring into the timbers. *Ibid.*

County aid: Contracts.

5. Under sec. 1819, Stats. 1898 (providing that in certain cases, upon petition of the town board, the county board shall appropriate one half of the cost of the construction of a bridge and shall designate two of its members as its commissioners to co-operate with the town board, and that such board and said commissioners shall have full charge and authority to act in the letting, inspection, and acceptance of the work), neither the commissioners alone nor the commissioners and the town board together have any authority to bind the county by a contract for the construction of a bridge. *Johnson v. Buffalo Co.* 265

BROKERS.

1. Defendant agreed to pay plaintiff, a broker, a commission "on sale of my farm, or any part of it, at a price accepted by me. This commission only to be paid in case of sale to a party to whom said [plaintiff] has offered the property." Plaintiff was the first real-estate agent who offered the property to one H., although H. had previously been informed by his son-in-law that the property was for sale. H. afterwards bought a part of the farm through another agency. *Held*, that plaintiff was entitled to the commission. *Terry v. Reynolds*, 122

2. In an action to recover such commission, evidence as to plaintiff's efforts to sell the land to other persons, and as to an offer secured by him of a greater amount than that paid by H., which offer was rejected by defendant, was properly excluded. *Ibid.*

BUILDING CONTRACTS.

1. Contractors agreed to erect a building for plaintiff and gave bond with certain of the defendants as sureties, for faithful performance of the contract. Before the building was completed a corporation was organized, to which plaintiff conveyed the property. Afterwards the contractors brought suit against the corporation to enforce a lien for an amount alleged to be due under the contract,

which was alleged to have terminated when the building was inclosed, and also for the value of labor and materials furnished after such alleged termination of the contract. Neither the plaintiff herein nor the sureties on the contractors' bond were made parties to that suit, though the corporation notified the sureties of the pendency of the action and that there had been a breach of the bond for which they were liable. No counterclaim for such breach was pleaded in that action. Judgment was rendered therein against the contractors, on the ground that all the services and materials for which the lien was claimed had been rendered and furnished under the original contract, which the contractors had failed to perform, and hence that they were not entitled to such lien. In this action, brought against the contractors and their sureties for breach of the original contract, the contractors counterclaimed for an amount alleged to be due for extra work and materials. *Held*, that the former judgment was not conclusive upon the defendants. *Grafton v. Hinkley*, 46

2. A building contract provided that work thereunder should be terminated with inclosing the building unless the contractors should be notified in writing, by a certain date, to complete the work. The contractors waived such written notice and proceeded with the work of completing the building. *Held*, that the sureties on the contractors' bond for faithful performance were not thereby released as to the portion of the contract which was not to be performed unless the written notice was given. DODGE, J., dissents. *Ibid.*

BURDEN OF PROOF. See ATTORNEYS. CLERKS OF COURTS, 8. TRUSTS, 2.

CASES DISTINGUISHED, ETC.

1. *Baker v. Madison*, 62 Wis. 152; *Crouse v. C. & N. W. R. Co.* 102 Wis. 209 (as to costs), distinguished. *Collins v. Janesville*, 361
2. *Becker v. Trickel*, 80 Wis. 484 (as to rescission), overruled. *Ludington v. Patton*, 247
3. *Conway v. Smith*, 13 Wis. 125; *Todd v. Lee*, 15 Wis. 365; *Leonard v. Rogan*, 20 Wis. 540; *Meyers v. Rahte*, 46 Wis. 655; *Krouskop v. Shontz*, 51 Wis. 204; *Mueller v. Wiese*, 95 Wis. 381 (as to contracts of married women), distinguished. *Stack v. Padden*, 44, 45
4. *Crouse v. C. & N. W. R. Co.* 102 Wis. 209. See No. 1.
5. *Detroit S. Co. v. Kelly*, 78 Wis. 134. See No. 33.
6. *Dugal v. Chippewa Falls*, 101 Wis. 533 (as to special verdict), distinguished. *Shaw v. Gilbert*, 184
7. *Duthie v. Washburn*, 87 Wis. 233; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109 (as to defining ordinary care), distinguished. *Chase v. Blodgett M. Co.* 660
8. *Electric App. Co. v. U. S. F. & G. Co.* 110 Wis. 434 (as to intent to benefit third person), distinguished. *Lenz v. C. & N. W. R. Co.* 204
9. *Galloway v. Hamilton*, 68 Wis. 651 (as to deed of corporation), distinguished. *Marvin v. Anderson*, 392
10. *Gatzow v. Buening*, 106 Wis. 1 (as to damages), distinguished. *Hacker v. Heiney*, 320
11. *George v. Benjamin*, 100 Wis. 622; *Hodges v. Nalty*, 104 Wis. 464 (as to parties), distinguished. *Hawarden v. Y. & L. C. Co.* 552
12. *Grant v. Law*, 29 Wis. 99 (as to rescission), explained. *Ludington v. Patton*, 247

18. *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109. See No. 7.

14. *Hewitt v. Follett*, 51 Wis. 264 (as to reviewable order), followed. *Morrell v. Glasspoole*, 292, 294

15. *Hodges v. Nalty*, 104 Wis. 464. See No. 11.

16. *Horn v. C. & N. W. R. Co.* 38 Wis. 463. See No. 27.

17. *Jeffris v. Fitchburg R. Co.* 93 Wis. 259 (as to evidence of insolvency), distinguished. *Shaw v. Gilbert*, 176

18. *Jones v. Roberts*, 84 Wis. 465 (as to final determination), distinguished. *Swarthout v. Swarthout*, 107

19. *Krouskop v. Shontz*, 51 Wis. 204. See No. 8.

20. *Leonard v. Rogan*, 20 Wis. 540. See No. 3.

21. *McMahon v. Ida M. Co.* 95 Wis. 308 (as to fellow-servants), distinguished. *Wiskie v. Montello G. Co.* 443, 451

22. *Melchoir v. McCarthy*, 31 Wis. 252; *Troewert v. Decker*, 51 Wis. 46; *Williams v. Lane*, 87 Wis. 152 (as to Sunday contracts), distinguished. *Ainsworth v. Williams*, 19

23. *Meyers v. Rahte*, 46 Wis. 655. See No. 3.

24. *Mueller v. Wiese*, 95 Wis. 381. See No. 8.

25. *O'Dell v. Burnham*, 61 Wis. 562. See No. 28.

26. *Patten P. Co. v. G. B. & M. C. Co.* 93 Wis. 283 (as to judgment after reversal), distinguished. *Finney v. Guy*, 299

27. *Pettit v. May*, 34 Wis. 666; *Horn v. C. & N. W. R. Co.* 38 Wis. 463; *Stittgen v. Rundle*, 99 Wis. 78 (as to judicial notice), distinguished. *Davey v. Janesville*, 636

28. *Potter v. Taggart*, 54 Wis. 395; *O'Dell v. Burnham*, 61 Wis. 562 (as to rescission), distinguished. *Hyland v. Roe*, 370

29. *Reinke v. Wright*, 93 Wis. 368 (as to exceptions to findings), distinguished. *Kreckeberg v. Leslie*, 462

30. *State ex rel. Hamilton v. Municipal Court*, 89 Wis. 358 (as to summary police jurisdiction), criticised. *Ogden v. Madison*, 428, 429

31. *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208. See No. 32.

32. *State ex rel. Taylor v. Superior*, 108 Wis. 16; *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208 (as to laches: estoppel), distinguished. *Jorgenson v. Superior*, 569

33. *Steen v. Norton*, 45 Wis. 412; *Detroit S. Co. v. Kelly*, 78 Wis. 134 (as to jurisdiction), distinguished. *Griswold v. Nichols*, 347

34. *Stittgen v. Rundle*, 99 Wis. 78. See No. 27.

35. *Tabor v. Tabor*, 85 Wis. 313 (as to precatory trust), distinguished. *Swarthout v. Swarthout*, 111

36. *Todd v. Lee*, 15 Wis. 365. See No. 8.

37. *Thompson v. Thompson*, 24 Wis. 515 (as to bond), distinguished and explained. *Ellis v. Barron Co.* 580

38. *Troewert v. Decker*, 51 Wis. 46. See No. 22.

39. *Williams v. Lane*, 87 Wis. 152. See No. 22.

CERTAINTY in pleading, etc. See RAILROADS, 5.

CERTIORARI.

When the return to a writ of *certiorari* shows the proceedings to have been with full jurisdiction and regular, the writ may be quashed. *State ex rel. Posbrig v. Daubner*, 671

CHANGE OF GRADE. See MUNICIPAL CORPORATIONS, 8–11.
CHATTEL MORTGAGES. See LIENS, 2. REPLEVIN, 1.
CITIES. See MUNICIPAL CORPORATIONS.
CLAIMS.
Against cities. See APPEAL, 32, 33.
Against counties. See APPEAL, 31.
Against decedents. See BANKS, 4, 7, 9. DESCENT.

CLERKS OF COURTS.

1. Sec. 747, R. S. 1878, provides that clerks of the circuit courts shall be entitled to the fees therein specified and *no more*, but that whenever the county board may think the compensation therein provided insufficient they may order an additional sum to be paid out of the county treasury. *Held*, that payments by the county to the clerk in addition to the statutory fees cannot be justified under the latter provision, where no claim was made that the compensation allowed by statute was insufficient and the county board did not consider that question but merely allowed the unauthorized charges or items in the fee bills presented by the clerk. *St. Croix Co. v. Webster*, 270
2. The provision of sec. 747, R. S. 1878, which allows the clerk certain fees "for making copies of any judgment, order, report or other paper or record" does not authorize him to make any charge for writing the names of eligible jurors, cutting them apart, and putting them in the box ready for the drawing of the panel. *Ibid.*
3. Neither the provision above quoted, nor that which allows a fee "for recording any paper, order, judgment or report when required," authorizes any charge for transcribing the court minutes into a book. *Ibid.*
4. Under sec. 747, R. S. 1878, the clerk of the circuit court is entitled to $1 and no more for drawing the panel of jurors, and to the same amount for admitting to citizenship, including certificate. *Ibid.*
5. Under sec. 4060, R. S. 1878, witnesses in criminal cases are to make and present to the clerk their affidavits of attendance and travel, and if the clerk administers the oath to such an affidavit it is a service performed for the witness and not for the county; but the fees for certificates of attendance, etc., issued to such witnesses are properly chargeable to the county. *Ibid.*
6. The clerk's fees for certificates of attendance and mileage issued to jurors and court officers under secs. 2560 and 733, R. S. 1878, are a proper charge against the county. *Ibid.*
7. For the certified transcript of the list of certificates issued to jurors, etc., transmitted to the county board pursuant to subd. 8, sec. 742, R. S. 1878, the clerk is entitled to compensation from the county, under the clause of sec. 747 which provides a fee for making a copy of "a judgment, order, report or other paper or record." *Ibid.*
8. In an action by a county to recover the amount of fees alleged to have been unlawfully paid to the clerk of the circuit court, the burden is upon the county to show by affirmative evidence the illegality of any items complained of. *Ibid.*
9. In an action at law by a county to recover the amount of unauthorized charges which had been allowed by the county board on the fee bills of the clerk of the circuit court and paid to such clerk, there is no estoppel barring a recovery where the clerk neither

performed any service nor changed his position by reason of any action taken by the county, but simply performed his duties as required by law. *Ibid.*

COMMON SCHOOLS. See TAXATION, 1.

CONDEMNATION OF LAND. See RAILROADS.

CONDITIONAL SALE. See LOGS AND TIMBER, 2.

CONDITIONS PRECEDENT. See BANKS, 3. CONTRACTS, 1-3.

CO-EMPLOYEES. See MASTER AND SERVANT.

CONFLICT OF LAWS. See EVIDENCE, 4. LOGS AND TIMBER, 2.

CONSOLIDATION of actions. See ACTION, 3, 4.

CONSPIRACY.

See ACTION 2. PARTIES.

Persons have a right to combine for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other for which he may recover damages, notwithstanding such purpose, if formed and executed by an individual, would not be actionable. Thus, where the business of a retail coal dealer has been destroyed by a combination between the wholesalers and certain retailers, one of the purposes of which was to force out of business all retailers not parties thereto, he may recover from the members of the combination for the damage thus caused. *Hawarden v. Youghiogheny & Lehigh Coal Co.* 545

CONSTABLES. See ATTACHMENT. JUSTICES' COURTS, 1, 2. REPLEVIN.

CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS, 7. STATUTES, 1. VILLAGES, 8.

1. Some classes of citizens may by law enjoy greater privileges than others or be subjected to different burdens or restrictions, provided the classification be not arbitrary and for the purpose of discrimination only, but be made upon grounds and in recognition of conditions or characteristics which are germane to a legitimate object of police regulation. Thus, in the exercise of the police power, the legislature may by law exclude unfit and incompetent persons from the practice of medicine in this state. *State ex rel. Kellogg v. Currens,* 431

2. The sufficiency of the reasons for a classification of persons in respect to privileges or restrictions is for the legislature, not for the courts; and only in a case clear beyond a reasonable doubt will the courts declare a statute invalid on the ground that its purpose or the classifications it makes are without reason to support them. *Ibid.*

3. Ch. 306, Laws of 1901, requires all persons commencing the practice of medicine or surgery in this state to submit to an examination by the board of medical examiners, and to present a diploma from a reputable medical college which requires certain specified courses before graduation, and to pay certain fees for the examination and certificate, but provides that any student who, at the date of the enactment, was matriculated in any medical college of this state which requires certain courses of study, shall, on pres-

entation of his diploma from such college and payment of the fees, be admitted to practice without further examination. *Held*, that the act is not in violation of sec. 2, art. IV, Const. of U. S. (which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states), nor of the XIVth amendment, Const. of U. S. (which prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and provides that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"), nor of sec. 1, art. I, Const. of Wis. (which declares that "all men are born equally free and independent, and have certain inherent rights; among which are life, liberty and the pursuit of happiness"). *Ibid.*

4. Where a relator is seeking to compel the issuance to him of a license to practice medicine under a law of this state, he cannot be heard to assail the validity of a provision of that law on the ground that it is unconstitutional. *Ibid.*

CONTRACTS.

See ARBITRATION. ATTORNEYS. BILLS AND NOTES. BRIDGES, 5. BROKERS. BUILDING CONTRACTS. CORPORATIONS, 1, 4–8. DECEIT, 19. EJECTMENT, 4. EVIDENCE, 3. FRAUD. INSOLVENCY. INSURANCE. LANDLORD AND TENANT, 1. MARRIED WOMEN. NEGLIGENCE, 2–6. PLEADING, 4. PRINCIPAL AND AGENT. PRINCIPAL AND SURETY. RAILROADS, 8. TOWNS. TRUSTS. VENDOR AND PURCHASER. WILLS, 6, 9.

Rescission for fraud.

1. In respect to an action in equity for the rescission of a contract on the ground of fraud, previous restoration or offer to restore what was received thereon is not a condition precedent to the right to commence the same, as in case of an action at law. In equity it is only necessary to show by the complaint a willingness to do equity, and a failure in that regard does not go to the cause of action unless taken advantage of by a special demurrer. A demurrer *ore tenus* is not sufficient. *Ludington v. Patton*, 208

2. The doctrine that a person must stand upon his contract or rescind it *in toto* and restore or offer to restore all he received thereon so far as strict equity requires, does not apply to an action in equity to rescind a contract on the ground of fraud, except as regards willingness to submit to a complete restoration of the original relations between the parties and the judgment to be entered in the case. *Ibid.*

3. An action at law to recover back that which has been paid upon a contract void for fraud, supposes a precedent rescission of the contract by act of the plaintiff; an action in equity to rescind a contract supposes need of equity to effect that end and looks to the decision in the action to accomplish it and to impose such terms of the rescission as may be deemed equitable under all the circumstances. *Ibid.*

4. The commencement of an action at law for damages upon the theory of an existing contract, after the commencement of an action to rescind such contract on the ground of fraud, does not affect the latter action. The commencement of the first action constitutes an irrevocable choice between inconsistent remedies. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See BRIDGES, 4. MUNICIPAL CORPORATIONS, 16–18. NEGLIGENCE, 1.

CONVERSION. See TENANCY IN COMMON.

CONVEYANCES. See CORPORATIONS, 8. LOGS AND TIMBER. RAILROADS, 8. VENDOR AND PURCHASER.

CORPORATIONS.

Incorporation: De facto corporations. See INSURANCE, 2, 3.

1. One who deals with a *de facto* corporation as a corporation is estopped to question the validity of its organization, at least so far as transactions within its supposed corporate powers are concerned. *Gilman v. Druse*, 400

Issue of stock without consideration: Rights and liabilities: Bond of officer. See BANKS, 6, 7, 10. DECEIT, 15.

2. Corporate stock issued without consideration, in violation of sec. 1758, Stats. 1898, is void even in the hands of innocent purchasers to whom new certificates have been issued, and no estoppel of the corporation gives to such purchasers the rights of stockholders. In an action by the corporation upon the bond of its officer who wrongfully issued such stock there can be no recovery, therefore, on the ground that such issue damaged the corporation by the creation of stockholders' rights. *First Ave. L. Co. v. Parker*, 1

3. Such official misconduct may, however, have cast upon the corporation a liability for damages in an action for deceit based on the false declarations contained in the stock certificate. But in the action on the official bond it must at least be shown that such liability exists, by allegations that the purchasers of the certificates relied upon the declarations therein and were ignorant of their falsity and free from negligence. [Whether an action could be maintained on the official bond for a breach thereof which had resulted merely in the creation of a liability, before the plaintiff corporation had actually been compelled to pay anything thereon, not determined.] *Ibid.*

Stockholders' liability to creditors. See BANKS, 4–9.

Officers and agents: Powers and liabilities. See CORPORATIONS, 2, 3, 7, 8.

Corporate powers: Sales to stockholders: Purchase of its own stock: Creditors' lien: Deeds.

4. A solvent, going corporation has the same right to sell its property in the regular course of business, regardless of whether the vendee is a stockholder of the corporation, as a natural person. *Marvin v. Anderson*, 387

5. The trust fund doctrine, so called, has no application to a going corporation. Its creditors have no equitable lien upon its assets. Such a lien does not attach till the corporation is insolvent and has either suspended business or is on the verge of collapse, so that it may reasonably be said to be civilly dead as regards the purposes for which it was organized. *Ibid.*

6. A solvent corporation may purchase its own stock if not prohibited by its articles of organization or some statute. *Ibid.*

7. If capital stock in a corporation is purchased for it by its officers without any special authority so to do, the transaction cannot be impeached by stockholders who knew of and consented to the transaction, or by the corporation or any representative thereof, if

all the stockholders acquiesced in the purchase, nor by subsequent creditors. *Ibid.*

8. If the deed of a corporation is executed in the manner prescribed by statute, the presumption is that its officers were duly authorized to make it. Such presumption will prevail against all persons who acquiesced in the transaction, or mere proof that corporate action by the stockholders was not taken, specifically authorizing the particular transaction. *Ibid.*

Insolvency. See BANKS. CORPORATIONS, 5. DECEIT, 2–16. INSOLVENCY, 2, 4.

Insurance corporations. See INSURANCE, 1–14.

Foreign corporations. See INSURANCE, 1.

COSTS. See APPEAL, 13, 30.

COTENANCY. See TENANCY IN COMMON.

COUNTERCLAIM. See EJECTMENT, 3.

COUNTIES. See APPEAL, 31. BRIDGES, 5. CLERKS OF COURTS. TAXATION.

COUNTY COURT.

See COURTS.

An application to the county court to set aside an order, after the time for appeal has expired, on the ground of fraud or mistake, is an application to the equity power of the court and will be denied if the applicant has been guilty of laches. *Roberts v. Weadock*, 489

COURT AND JURY. See APPEAL, 19. CRIMINAL LAW, 16–20, 24. DECEIT, 2, 4, 9, 10, 17. EJECTMENT, 1. INSURANCE, 15. NEGLIGENCE, 1. SLANDER, 7.

COURTS.

See COUNTY COURT. JUSTICES' COURTS.

A court of general jurisdiction, like the circuit court, has jurisdiction concurrent with the probate court in all matter connected with the settlement of estates. Such jurisdiction is suspended by the jurisdiction of the probate court in the absence of peculiar circumstances rendering the latter jurisdiction inadequate to furnish as complete and effective a remedy as the former. *Ludington v. Patton*, 208

CREDITORS' REMEDIES. See ATTACHMENT. BANKS, 4–9. CORPORATIONS, 5, 7. DECEIT, 2–18. INSOLVENCY. LIENS. PRINCIPAL AND SURETY. RAILROADS, 3. TAXATION, 2. VENDOR AND PURCHASER.

CRIMINAL LAW AND PRACTICE.

See INTOXICATING LIQUORS.

Preliminary examination: Second examination.

1. Under sec. 4656, Stats. 1898 (giving the district attorney authority to hold a second preliminary examination of a person discharged on the first examination, if he "shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged"), when the district attorney, acting in good faith, has decided that the evidence discovered is sufficient for the purpose indicated, his conclusion is not open to review upon an objection,

at the trial, to the legality of the second examination; nor is it jurisdictional that he should recite in the proceedings that he has discovered additional evidence. *Campbell v. State*, 152

2. Although on the first examination the magistrate has found that "there is not good reason to believe the offense stated in the complaint has been committed," such finding is not a final or conclusive adjudication and is no bar to a second examination under sec. 4656, Stats. 1898. *Ibid.*

Insanity: Evidence on special and on general issue: Incapacity to form specific intent.

3. On the trial of the issue of insanity in a prosecution for a criminal homicide, it is proper to show on the part of the accused that he was adjudged insane and committed to the state hospital at a time previous to the homicide, and the facts on which the adjudication took place, and to that end to introduce in evidence the reports of the examining physicians. *Hempton v. State*, 127

4. The daily record of a patient at the hospital for the insane, required to be kept by sec. 561*q*, Stats. 1898, is admissible in evidence to show the mental characteristics of the patient while at the hospital in any judicial proceedings where the facts in that regard are material, under the general rule that a public record required to be kept for public purposes is admissible in a judicial proceeding where such matters are material. *Ibid.*

5. Insanity is provable by circumstantial evidence mainly, all the acts and mental characteristics of the person whose sanity is in question, covering a considerable period of time prior to the particular time in question and thereafter as well, being material. *Ibid.*

6. The verdict of the jury, on the special issue as to the sanity of a person charged with a criminal offense at the time of the alleged commission thereof, that he was sane, precludes further inquiry as to mental impairment at such time entirely excusing the accused from legal responsibility; but on the plea of not guilty, evidence is permissible tending to show a condition of mind — whether produced by the use of intoxicating liquor or any other cause — rendering the accused incapable of forming a specific intent to commit the crime of murder at the time of the alleged offense, and bearing on the character of the offense if he is guilty at all. *Ibid.*

7. On the question of whether, because of an abnormal mental condition, the accused in a prosecution for criminal homicide was capable of forming a design to kill, a material issuable question arises involving mental condition, which may be evidenced by proof of the use of intoxicating liquors or by any other adequate disturbing cause. *Ibid.*

8. A nonexpert witness may give opinion evidence as to the mental condition of a person if he is shown to have knowledge of facts regarding such person reasonably sufficient in the judgment of the court to enable him to form an opinion. *Ibid.*

9. On the question of the competency of a nonexpert witness to testify under the foregoing rule, the decision of the court, if it does not transcend the bounds of reason, is conclusive. *Ibid.*

10. Under the statutes of this state, after a person has been on parole continuously from the hospital for the insane for the period of two years or more, the adjudication upon which he was committed to the hospital is no longer *prima facie* proof of insanity. *Ibid.*

11. The rule, independent of the statute, that a person adjudged insane, continues so till the contrary is shown, is a rule of evidence, subject to reasonable change by legislative will. It does not apply to insanity other than that of a nature liable to be permanent. *Ibid.*

Intoxication: Degree of homicide: Intent.

12. Evidence of voluntary intoxication of a person accused of the crime of murder has no significance as to murder in the first degree, unless the intoxication be such as to satisfy the jury that the accused, at the time of the homicide, was incapable of forming a deliberate intent to take the life of the deceased. *Ibid.*

Evidence: Right to cross-examine.

13. The right of reasonable cross-examination by leading questions is absolute. The denial of it is the denial of a valuable right, and, if prejudicial, constitutes reversible error. *Ibid.*

Same: Articles likely to arouse prejudice: Prior conversations.

14. Articles likely to excite sympathy or arouse prejudice should not be admitted in evidence before a jury, unless the ends of justice demand it. In this case the admission of the hat of the deceased and of the chair with which the accused struck him is *held* not erroneous, and the admission of a portion of the skull, brain, etc., of the deceased, though of more doubtful propriety, is *held* not without warrant. *Campbell v. State,* 152

15. While the accused and an associate, as floor-managers at a dance were attempting to quiet a disturbance, deceased came up and struck the accused a violent blow in the face and was then immediately struck with a cane by the associate and with a chair by the accused, one of the blows causing his death. On the trial of the accused for murder it is *held* that it was proper to exclude evidence, offered on his behalf, that deceased had said, in a saloon, "that if a row was expected and if they had any trouble, he wanted to be notified so he could take part in it,"—the accused having been in no way connected with such conversation and having had no knowledge of it prior to the affray. *Ibid.*

Court and jury: Excusable homicide: Dangerous weapon.

16. In such case the accused was entitled to have the question of excusable homicide (under sec. 4367, Stats. 1898) submitted to the jury, the facts indicating that there was no intent to kill, that the combat was sudden, the provocation great and such that the jury might have believed it sufficient, the killing not done in a cruel or unusual manner, and the chair not necessarily a dangerous weapon. *Ibid.*

17. In many cases the court may decide that a particular weapon was or was not a dangerous weapon, and when practicable it is the court's duty to do so. But when the weapon (in this case a chair) might be dangerous or not, according to the manner in which it was used or the part of the body struck, and the evidence on these points is in dispute, the question must be left to the jury. *Ibid.*

Same: Instructions.

18. On a trial for murder it appeared that the deceased, whose death resulted from a fracture of the skull, had been struck on the right side of the head by a cane in the hands of one person and had also been struck by a chair in the hands of the accused. There was but one wound on the head, and that on the right side. The accused claimed that his blow did not reach the head. Medical ex-

perts testified that the cane, though light, might have caused the fracture. *Held*, that it was error to instruct the jury that there was and could be no evidence to warrant a conclusion that there was or was not a fracture resulting from the blow of the cane. *Ibid.*

19. Upon the trial of a person for murder, where the question of whether the accused caused the death of the deceased is disputed, it is error, though not necessarily reversible error, for the court to use language in instructions to the jury or in remarks upon the trial indicating that the accused took the life of the deceased. *Hempton v. State*, 127

Same: Degrees of homicide.

20. While the court, in a prosecution for murder, should submit the case to the jury for consideration upon every phase of criminal homicide which the evidence in any reasonable view of it suggests, if the submission is made of one or more of the higher degrees of criminal homicide so that the jury will understand that if a verdict of guilty be not found as to one of them a verdict of not guilty should be rendered, a failure to submit lesser degrees of homicidal offense is not reversible error, though the better practice is to scrutinize the evidence with the greatest care and to resolve all reasonable doubts as to whether the evidence points to a particular degree of criminal homicide or not in favor of submitting such degree to the jury, and to submit the same whether it be requested on the part of the accused or not. *Ibid.*

Jury: Separation: Misconduct.

21. The separation of the jury in a capital case is fatal to a conviction unless the court shall be satisfied, by evidence produced, that it was not followed by any misconduct on their part, or by any circumstance calculated to exert an improper influence upon the verdict. *Ibid.*

22. From the mere fact of the separation of a jury in a capital case contrary to the rule above indicated, a presumption of prejudice of the accused arises, and such presumption cannot be satisfactorily overcome by the affidavits of the jurors themselves and the officers sworn to attend them that they were not prejudicially affected by the separation or by anything that occurred during the time of such separation. *Ibid.*

23. The conduct of jurors while outside of the court room, impeaching their verdict, may be shown by their own affidavits. *Ibid.*

Insufficiency of evidence: Writ of error: Reversal: Alibi.

24. In a criminal prosecution, especially for a capital offense, the accused is entitled to have the sufficiency of the evidence passed upon by the trial judge, and also by the supreme court on writ of error if the question is properly presented by the record. *Lonergan v. State*, 453

25. Three persons, while attempting to escape after having made an assault with intent to rob, met a police officer and one or more of them shot him. The overwhelming preponderance of the evidence fixed the time of the shooting at not earlier than 6:35 o'clock. A long freight train passed a depot about a quarter of a mile from the scene of the tragedy at 6:25, and, proceeding without stopping, had passed a tower house half a mile from both places at not later than 6:32. At 6:45, when said train was about two miles distant, a tramp, apparently in a drunken condition, was discovered on top

of one of the cars. The evidence identifying him as one of the men who did the shooting was very weak. *Held*, that the possibility of such tramp having been at the scene of the murder when it was committed was in such doubt as to require reversal of a conviction therefor. *Ibid.*

CROSS-EXAMINATION. See CRIMINAL LAW, 13. EVIDENCE, 2.

DAMAGES.

See APPEAL, 27. DEATH. DECEIT, 13–18. SLANDER, 3–8.

1. A recovery of damages having no other basis than mere speculation or conjecture cannot be sustained. *Dickson v. Pritchard*, 310
2. The rule that there can be no recovery for mental suffering unless accompanied by other actual damages does not apply to cases based on malice. *Hacker v. Heiney*, 313
3. In an action for damages for a wrongful interference with personal or property rights, a specific allegation as to damages, specifying the amount thereof, is not essential to the plaintiff's cause of action to recover such damages as are necessarily inferable from the facts alleged. *Luby v. Bennett*, 613
4. In an action for personal injuries caused by a fall on a defective sidewalk, a recovery of $5,000 damages is *held* not excessive, the evidence showing plaintiff to be in a very bad condition, with small chances of improvement. *Davey v. Janesville*, 628

DEATH.

See LIMITATION OF ACTIONS.

1. In an action for the death of a child four and one-half years old, it was error to admit in evidence a mortality table showing the expectancy of life of a child ten years of age, but not that of a child four and one-half, where the witness admitted that the expectancy of the latter was less than that of the child of ten, but could not state what it was. *Decker v. McSorley*, 91
2. Evidence that a boy four and one-half years old was strong and healthy at the time he was killed, that his father had no property and had a wife and four children,—with no showing as to the health of the parents, their age, or the earning capacity of the father,—is insufficient to justify a jury in finding that there was any reasonable expectancy of pecuniary benefit to the parents from the continuance of the boy's life beyond minority. *Ibid.*

DEBTOR AND CREDITOR. See BANKS, 4–9. CORPORATIONS, 5, 7. DECEIT, 2–18. INSOLVENCY. LIENS. PRINCIPAL AND SURETY. RAILROADS, 8. TAXATION, 2. VENDOR AND PURCHASER.

DECEIT.

See CORPORATIONS, 8. FRAUD.

1. A complaint alleging that plaintiff and another, since deceased, parted with valuable property in ignorant reliance upon false statements of the defendant, known by him to be false, and intended to induce plaintiff to so part with her property, states a cause of action, even though the demand for judgment includes certain elements of damages not recoverable. *Shaw v. Gilbert*, 165

2. The question being whether plaintiff's firm exercised due care and diligence in the matter of extending credit to a corporation in reliance upon defendant's statements as to its financial condition. a witness, who had been the auditor of the corporation, testified that shortly after the time at which such statements were alleged to have been made he made a full showing of the affairs of the corporation to plaintiff's partner (since deceased), with balance sheet, inventory, etc., and full explanation of the facts. *Held*. that in submitting the case to the jury sufficient significance was not given to that testimony. The question of fact whether the auditor gave such information to plaintiff's firm should have been specifically submitted, either by direct question or by instruction that, if he did plaintiff could not be held to have exercised reasonable care in continuing to rely upon defendant's representations in conflict therewith. *Ibid.*

3. Defendant having denied that he ever had any conversations with plaintiff's agent to whom he was alleged to have made the statements in question, the submission to the jury of questions which, in form, assumed that such conversations were had, is *held* confusing, even though accompanied by explanatory instructions; but whether a material error was thus committed is not determined. *Ibid.*

4. Where plaintiff's agent testified positively that such conversations were had, the question was one for the jury, even though defendant's positive denial had some corroboration. *Ibid.*

5. The inclusion, in a question of a special verdict, of several inquiries capable of answer in different ways is not a material error unless, measured by the answer, it leaves the jury's decision ambiguous and uncertain. Thus, the jury having found, in answer to other questions, that defendant made three several false representations, an affirmative answer to a further question as to whether plaintiff relied upon "such representations," leaves no ambiguity. *Ibid.*

6. The answer to such question is equally sufficient to support a judgment whether the reliance was placed on one or on all of the false statements, they being each and all material. *Ibid.*

7. A false statement relied on, and without which the transaction resulting in damage would not have been had, constitutes legal deceit, although it may not have been the sole motive or consideration moving the defrauded party thereto; and it is immaterial, therefore, whether or not he also relied on other unactionable statements. *Ibid.*

8. If a false statement as to the financial condition of a corporation was made for the purpose of inducing a creditor to furnish additional materials to it, it is immaterial whether or not such statement was also made in part for the purpose of assuring the creditor that the then existing indebtedness would be paid. *Ibid.*

9. In such a case, evidence showing that both parties had in expectation that the creditor was to continue furnishing materials to the corporation, and testimony that one of the assertions made was that such creditor might fill all orders of the corporation and extend its notes with perfect safety, were sufficient to carry to the jury the question of intent to influence the creditor's conduct in respect to future transactions. *Ibid.*

10. Statements, made for the purpose of inducing extension of credit to a corporation, to the effect that it was solvent, that it had a large

amount of unincumbered assets, and that its business was prosperous and profitable, are all material as matter of law, and should be so held in an action for the deceit. *Ibid.*

11. A slight want of ordinary care is inconsistent with the reasonable diligence which, in order to a recovery for deceit, must have been exercised by plaintiff in relying upon the false statements; and refusal to so instruct the jury, when requested, is error. *Ibid.*

12. In an action for deceit it was error to refuse to instruct the jury to the effect that the fraud could not be found from conjecture or mere inference but must be clearly proven. *Ibid.*

13. For a deceit whereby plaintiff was induced to sell goods to an insolvent corporation, the price at which the goods were so sold, being shown to be their fair value, was the proper measure of damages, even though an ordinary measure of trade profit was included therein. *Ibid.*

14. In such a case the value neither of the accounts for such goods nor of the notes received upon monthly settlements is material, prior to the time when, in accordance with the course of business contemplated by the parties, the plaintiff would be expected to demand and insist upon payment. *Ibid.*

15. But the value, if any, of plaintiff's claim against the corporation upon the settlement of its affairs under an assignment for the benefit of creditors, should be deducted from the damages otherwise recoverable; and in estimating such value the liability of responsible stockholders of the corporation for stock issued to them without consideration should be considered as an asset of the corporation, including, in such liability, interest upon the face value of that stock from the date of its issue. *Ibid.*

16. After a partnership consisting of plaintiff and one H. had been induced by deceit to become a creditor of an insolvent corporation, plaintiff purchased, for full value, all of H.'s interest (being one sixth) in the firm and its assets, including the claim against the corporation. H. died, and thereafter plaintiff brought this action for the deceit. *Held*, that after the sale by H. to plaintiff there existed no joint right of action for the tort, and that plaintiff could not, therefore, recover, as survivor of two joint sufferers, the whole damage caused by the deceit, but could recover only her separate interest (five sixths) therein. CASSODAY, C. J., dissents. *Ibid.*

17. One defrauded of money or valuable property is entitled to recover not only such money or value but also interest from the date of the deprivation; and when value and date are found by the jury the court should apply the law as to interest and not leave the recovery thereof to the discretion of the jury. *Ibid.*

18. In an action for deceit whereby plaintiff was induced to give credit to an insolvent, interest on the amount of the loss can be recovered only from the date when, according to the contract and the customary or contemplated course of dealing, plaintiff was entitled to insist on payment from such insolvent. *Ibid.*

19. In an action for deceit whereby plaintiffs were induced to enter into a contract with defendant, a recovery cannot be based upon defendant's failure to disclose facts within his knowledge, which were not referred to in the conversation between the parties before the contract was made and which defendant did not know were of importance to plaintiffs. *Dickson v. Pritchard*, 310

20. Where a person was induced by false representations as to the quality of goods which had been purchased for a proposed department store to establish a millinery department therein with a first-class stock of goods, the fact that she was seeking a desirable location for such an establishment in the same city would not prevent her recovering damages caused by the deceit. *Benolkin v. Guthrie*, 554

21. Representations made by the proprietor of a proposed department store, to a person contemplating the establishment of a millinery store, for the purpose of inducing the latter to locate in such department store, that, as an existing fact, he had purchased a first-class stock of goods for such store, including the various articles of ladies' wear of the best quality, are statements of fact material to the question whether such store would be a desirable place in which to conduct a first-class millinery business, and not mere expressions of opinion, and if false may form the basis of an action for deceit. *Ibid.*

22. Allegations, in the complaint in an action to recover for such deceit, that but for said false representations plaintiff would not have purchased said millinery stock at all, and that by reason thereof, being unable to sell the goods, she suffered certain losses by depreciation, are *held* sufficient to show that the loss by depreciation was the result of the deceit. *Ibid.*

DECLARATIONS. See EJECTMENT, 2. TRIAL, 7.

DEEDS. See CORPORATIONS, 8. LOGS AND TIMBER. RAILROADS, 3. VENDOR AND PURCHASER.

DE FACTO CORPORATIONS. See CORPORATIONS, 1. INSURANCE, 3.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES of homicide. See CRIMINAL LAW, 12, 20.

DELAY. See COUNTY COURT. EQUITY.

DEMURRER. See CONTRACTS, 1. MALICIOUS PROSECUTION, 2, 5. MANDAMUS, 2, 3. PLEADING, 2, 3. PUBLIC LANDS, 3.

DEPOSITIONS. See EVIDENCE, 1.

DESCENT AND DISTRIBUTION.

See BANKS, 4, 7, 9.

One who seeks, under sec. 3845. Stats. 1898, to recover from a legatee or next of kin a claim that might have been proved in county court must allege and prove that no time had been fixed in which creditors might present their claims against the deceased for allowance, or that no notice of such limitation had been ordered or given. *Gager v. Paul*, 688

DISCRETION. See APPEAL, 8, 24. INSURANCE, 1. NEW TRIAL. TRIAL, 2, 4.

DISORDERLY HOUSES. See MUNICIPAL CORPORATIONS, 6, 7.

DISTRICT ATTORNEY. See CRIMINAL LAW, 1, 2.

DOWER. See WILLS, 14.

EJECTMENT.

1. In ejectment to recover a strip of land two rods wide, of which the paper title was in plaintiff, defendant claimed that the strip had been adversely used for more than twenty years by the public as a

highway and by himself as a private way, but there was no evidence of any travel over a part of the strip, at least one rod wide, lying on one side of a fence which ran longitudinally through the strip and bounded plaintiff's occupancy. *Held*, that it was error to direct a verdict for defendant. *Kreckeberg v. Leslie*, 462

2. Declarations of one in possession of land, characterizing or defining his possession and claim thereto, are admissible in evidence against those claiming under or in privity with him. *Ibid.*

3. In an action of ejectment neither the running of the statute of limitations nor facts constituting an estoppel *in pais* can properly be pleaded as a counterclaim, under sec. 3078, Stats. 1898, each being available as a legal defense. *Appleton Mfg. Co. v. Fox River Paper Co.* 465

4. An executory contract for the sale of land which is silent on the subject of possession of the premises does not give the vendee any right of possession or entitle him to maintain ejectment against an intruder. *Grindo v. McGee*, 531

5. Plaintiff in ejectment had title to the premises and constructive possession by virtue of a tax deed issued to his grantor and duly recorded. Defendants claimed title and constructive possession under subsequent tax deeds which, however, had been fraudulently obtained by one of them while an agent of plaintiff upon tax certificates belonging to the latter. *Held*, that plaintiff was entitled to recover. *Ibid.*

6. In ejectment where plaintiff's title is in fee simple and defendants' alleged title is palpably and wholly bad, the latter are not prejudiced by the failure of the trial court to adjudicate the extent and quality of plaintiff's estate as required by subd. 7, sec. 3084, Stats. 1898, and the error will therefore be disregarded. *Ibid.*

ELECTION.
Of remedy. See CONTRACTS, 4. MORTGAGES, 2.
Of provision made by law. See WILLS, 4–15.
Of officers. See MUNICIPAL CORPORATIONS, 2.

EMINENT DOMAIN. See RAILROADS.

ENCROACHMENT. See HIGHWAYS, 2, 3.

EQUITY.

See ACTION, 2. BANKS, 8. CONTRACTS. COUNTY COURT. JUDGMENT. PARTIES. PUBLIC LANDS, 1. TRUSTS. WILLS, 8–15.

Mere delay in asserting a right, short of the limitation fixed by statute, does not bar the right in equity. *Ludington v. Patton*, 208

ESTATES OF DECEDENTS. See BANKS, 4, 7, 9. COURTS. DESCENT AND DISTRIBUTION. LIMITATION OF ACTIONS. WILLS.

ESTOPPEL. See CLERKS OF COURTS, 9. CORPORATIONS, 1, 7. EJECTMENT, 3. JURY, 2. MUNICIPAL CORPORATIONS, 10, 11. WILLS, 7.

EVIDENCE.

See ANIMALS, 2. APPEAL, 14, 15, 20, 23, 24. BROKERS, 2. CRIMINAL LAW, 8–15. DEATH. EJECTMENT, 2. INSOLVENCY, 8. MUNICIPAL CORPORATIONS, 1, 12–15, 17. NEGLIGENCE, 2–4. PLEADING, 4. SLANDER, 1–3, 5, 6. TRIAL, 3, 4, 7.

1. Plaintiff offered in evidence, to be used only as admissions, a deposition of one of the defendants previously taken at plaintiff's in-

stance. Objection being made because the witness was present, the court ruled, in effect, that if the deposition was introduced it would constitute said defendant plaintiff's witness, subject to the ordinary rules against impeachment. Plaintiff did not thereafter attempt to introduce the whole deposition, but was allowed to introduce such specific portions of it as he did offer. *Held*, that there was no error in the ruling. *Spuhr v. Kolb*, 119

2. Where, in an action for malicious prosecution of plaintiff on the charge of disposing of mortgaged property, plaintiff testified that the mortgage debt had been paid, it was proper, on the cross-examination, to allow defendant to bring out the fact that a judgment had been rendered determining that said debt had not been paid, and to admit, as a part of the cross-examination, the record of the action in which such judgment was rendered. *Lauterbach v. Netzo*, 326

3. Parol evidence is proper to explain the meaning of words used in a writing, which are ambiguous when applied to the subject which gave rise to such paper, as well as when the meaning of the writing is uncertain looking only at the language thereof. *Andrews v. Robertson*, 334

4. A publication entitled "Statutes of Minnesota, 1894," stating, on the title page, that it contains the statutes of that state in force December 31, 1894, compiled by W. and others, and containing, on the opposite page, an act of the Minnesota legislature entitled "an act relating to the compilation of the general laws of Minnesota by W. and others," designating such compilation as the general laws in force at the time mentioned, and declaring it to be competent evidence of the acts, etc., therein contained in all courts of that state,—*purports to be published* under the authority of Minnesota, within the meaning of sec. 4136, Stats. 1898, and is therefore presumptive evidence as to the laws of Minnesota in the courts of this state. *Hollister v. McCord*, 538

5. An objection to an hypothetical question should, upon request, be made specific and the exact nature of the defect in the question pointed out, in order to give to the court an opportunity to pass upon the precise question involved and to the opposing counsel an opportunity to remove the objection or supply the defect by other testimony. *Davey v. Janesville*, 628

6. In an action for personal injuries a physician who had attended the plaintiff professionally after the accident, and had testified to her condition and to the objective symptoms observable, is *held* to have been properly allowed to state his opinion as to the cause of her present condition, based upon what he saw of her condition and upon the facts that he had testified to. *Ibid.*

EXAMINATION.
Of offenders. See CRIMINAL LAW, 1, 2.
Of witnesses. See CRIMINAL LAW, 13. EVIDENCE, 1, 2.
Of jurors. See JURY, 1.

EXCEPTIONS. See APPEAL, 16, 17.

EXCESSIVE DAMAGES. See DAMAGES, 4. SLANDER, 4.

EXCISE LAWS. See INTOXICATING LIQUORS.

EXCUSABLE HOMICIDE. See CRIMINAL LAW, 16, 17.

EXEMPLARY DAMAGES. See SLANDER, 3, 4, 7.

EXEMPTIONS. See ATTACHMENT. REPLEVIN.

EXPECTANCY of life, etc. See DEATH.
EXPERT TESTIMONY. See EVIDENCE, 5, 6. MUNICIPAL CORPORATIONS, 12, 14.
FALSE REPRESENTATIONS. See DECEIT. FRAUD.
FEES. See CLERKS OF COURTS.
FELLOW-SERVANTS. See MASTER AND SERVANT.
FENCES. See HIGHWAYS, 2, 3.
FINDINGS of fact. See APPEAL, 11, 22, 28. HIGHWAYS, 3. TRIAL, 5, 6.
FIXTURES. See LANDLORD AND TENANT, 2.
FORECLOSURE. See MORTGAGES.
FOREIGN INSURANCE COMPANIES. See INSURANCE, 1.
FOREIGN STATUTES. See EVIDENCE, 4.

FRAUD.

See ATTORNEYS. BANKS, 1–3, 6, 7. CONTRACTS. COUNTY COURT. DECEIT. EJECTMENT, 5. INSOLVENCY. MORTGAGES, 3. PUBLIC LANDS, 2. TRUSTS. WILLS, 3–15.

In an action upon a written order for the purchase of a self-binder, given by a farmer unable to read English, the evidence — stated in the opinion — is *held* not sufficiently strong and cogent to sustain a finding of the jury that the vendor's agent misrepresented the contents of the order to the vendee. *Deering v. Hoeft*, 339

FRAUDULENT CONVEYANCES. See CORPORATIONS, 4, 5. INSOLVENCY.
GOVERNMENT LANDS. See PUBLIC LANDS.
HAIL INSURANCE. See INSURANCE, 2–8.

HIGHWAYS.

See BRIDGES. EJECTMENT, 1. MUNICIPAL CORPORATIONS, 12–18. TELEPHONE COMPANIES. TOWNS.

1. In an action for injuries alleged to have been caused by a large stone lying so near the traveled track as to constitute a defect in the highway, the court directed findings that the injury had been received and as to the amount of damages, and submitted to the jury the question, among others, whether the injury was caused by the defective and unsafe condition of the highway. In the instructions, however, the jury were substantially directed to assume that the stone caused the injury, and to pass upon the question whether, as situated, it constituted a defect, and in so doing to decide whether the track upon which plaintiff was traveling was a part of the traveled way or was so casual that his turning into the same constituted a deviation. The jury merely answered in the negative the question submitted as above stated, leaving all the other questions of the special verdict unanswered. *Held*, that the instructions had so confused the question that it was improbable that the minds of all the jurors had met in the answer, and that therefore the verdict could not stand. *Hebbe v. Maple Creek*, 480

2. Where a town procured the bringing of an action in the name of the state to recover the forfeiture imposed by sec. 1326, Stats. 1898, for obstructing a highway by means of a fence, employed the at-

torneys, and paid the expenses, it is in effect a party thereto, and the judgment therein is conclusive upon it, in a subsequent proceeding in its own name to compel the removal of the fence as an encroachment, upon any question which was litigated and finally decided in the former action. *Fulton v. Pomeroy*, 663

8. In an action to recover the forfeiture provided by sec. 1326, Stats. 1898, for obstructing a highway, the trial court found that there was no highway where the fence alleged to be an obstruction stood, but that the fence was on defendant's land. The judgment in favor of defendant was affirmed on appeal on the ground that, even upon the assumption that the fence stood in the highway, it did not constitute an obstruction, within the meaning of sec. 1326, but simply an encroachment under sec. 1330. *Held*, that the original findings were in no way set aside or impeached, and that the judgment as affirmed is conclusive that the *locus in quo* was not a part of the highway. *Ibid.*

HUSBAND AND WIFE. See MARRIED WOMEN.

HYPOTHETICAL QUESTIONS. See EVIDENCE, 5, 6.

INJUNCTION. See PARTIES. TOWNS, 4.

INSANITY. See CRIMINAL LAW, 8–11.

INSOLVENCY.

See BANKS. CORPORATIONS, 5. DECEIT, 2, 8–18.

1. The term "insolvency," as understood in the administration of bankrupt and insolvent laws, is inability of a person to pay his debts as they mature in the regular course of business; as understood in dealing with contracts challenged on the ground of fraud, actual or constructive, it has reference to insufficiency of assets of the debtor to cover his liabilities. *Marvin v. Anderson*, 387

2. In respect to the *bona fides* of a sale of property when challenged by a creditor of the vendor on the ground of fraud, the latter is said to have been solvent at the time of the sale if he then possessed a substantial excess of assets, on a cash basis, over and above his liabilities; and that rule applies to corporations as well as natural persons. *Ibid.*

3. Upon the question whether or not a person was insolvent, in the sense that his assets did not equal or exceed his debts, evidence of extreme and unusual acts and conduct indicative of financial embarrassment and distress, such as are the customary accompaniments and consequence of insolvency in fact and are not usual accompaniments of a contrary condition, is admissible as tending, in connection with other more direct evidence, to establish such insolvency; but such evidence should be submitted to the jury with cautionary instructions to consider carefully all circumstances and explanations before drawing an inference of actual inadequacy of assets, at fair and ordinary values, to satisfy the debts. *Shaw v. Gilbert*, 165

4. In determining whether or not a corporation is insolvent in the sense above stated, its capital stock should not be considered as a liability, and instructions to the jury upon that point should be without ambiguity. *Ibid.*

INSTRUCTIONS TO JURY. See DECEIT, 2, 3, 12. HIGHWAYS, 1. INSOLVENCY, 4. INSURANCE, 16. MUNICIPAL CORPORATIONS, 16, 18. NEGLIGENCE, 5, 6. PRINCIPAL AND AGENT, 1. SLANDER, 2, 8. TRIAL, 8–10.

INSURANCE.

Foreign companies: License: Mandamus.

1. Under secs. 1955*e*, 1955*f*, 1968, Stats. 1898 (requiring foreign assessment insurance companies to comply with certain conditions before being admitted to do business in this state, and requiring the commissioner of insurance to investigate their character and standing before admitting them, for the purpose of ascertaining whether such conditions have been complied with), said commissioner is entitled to a reasonable time in which to make the investigation, and to some extent is called upon to exercise discretion in passing upon the application and to pass judgment upon the facts disclosed by the investigation. He should not be compelled by *mandamus* to issue a license, where, although he had previously refused on insufficient grounds to issue the same, he had notified the applicant of a reconsideration of such action and, at the time of the issuance of the alternative writ, was proceeding to make proper examination into the affairs and condition of the company. *State ex rel. Court of Honor v. Giljohann*, 377

Hail insurance: Organization of company: Assessments.

2. Secs. 1956–1966, R. S. 1878, authorized the formation of corporations to transact the business of mutual insurance against loss or damage by hail to all kinds of "grain, fruits, hops, and legumen." Ch. 329, Laws of 1895, authorized the formation of mutual companies to insure against loss and damage to farm buildings, stock, and crops by hail, tornadoes, cyclones, or hurricanes, with greater powers than those granted by secs. 1956–1966, but the act contained no clause expressly repealing said sections, and both acts were substantially incorporated into the revision of 1898. *Held*, that the act of 1895 was not a revision of the whole subject matter of insurance against hail, and did not by necessary implication repeal secs. 1956–1966. *Gilman v. Druse*, 400

3. Articles of incorporation of a mutual hail insurance company organized under secs. 1956–1966, R. S. 1878, were signed in the body of the instrument instead of at the end, and no certificate of acknowledgment was attached as required by law, but the preamble recited that the signers thereby acknowledged and adopted said articles. The incorporators, business men not learned in the law, employed an attorney, who drew up the articles and subsequently advised them in making their by-laws, etc. The incorporators immediately organized and commenced the transaction of a large business in the corporate name. *Held*, a *bona fide* attempt to comply with the law, and that there was at least a *de facto* corporation. *Ibid.*

4. The provisions of secs. 1957, 1962, Stats. 1898, that all persons insured in a mutual hail insurance company shall be members of the corporation "during the current year in which they have insured, and until and including the second Monday of March thereafter," and that if the premiums "in any one year shall be insufficient to pay losses, such a corporation may levy an assessment upon each member thereof, in proportion to the amount insured, to cover such deficiency," contemplate one assessment for each year upon all persons insured during that year; and such assessment is therefore not to be confined to policy holders who were such at the time the losses which it represents occurred. *Ibid.*

5. *It would seem* that a statute authorizing the formation of corporations to insure "all kinds of grain, fruits, hops, and legumen" does not authorize the insurance of crops of tobacco. *Ibid.*

6. Where the articles of incorporation and the by-laws of a mutual company organized under such a statute were printed on each policy and stated that one of the purposes of the corporation was to insure tobacco, the policy holders took their policies charged with knowledge that the company proposed to insure tobacco, and cannot question its acts in that regard. *Ibid.*

7. Assessments upon the members of mutual insurance companies must be limited to the objects declared by law, and to the reasonably necessary expenses of collection, with a reasonable allowance for probable failure to collect a part thereof. *Ibid.*

8. Sec. 1962, S. & B. Ann. Stats. (providing that if the amount of premiums received in any one year by a mutual hail insurance company be insufficient to pay the losses, such corporation may levy an assessment to cover such deficiency), when construed in the light of other provisions contemplating the exaction of cash premiums, substantial in amount, out of which the general expenses of conducting the business shall be paid, authorizes an assessment for one purpose only, i. e. the payment of losses; and the inclusion of a considerable amount for the express purpose of paying ordinary expenses renders the assessment invalid. *Ibid.*

Mutual benefit societies: Expulsion of members: Prohibited occupation.

9. An appeal from an inferior to a superior tribunal (in this case from the local lodge to the grand lodge of a mutual benefit society) to avoid the effect of an absolutely void proceeding is unnecessary. *Langnecker v. Trustees of Grand Lodge A. O. U. W.* 279

10. Where a member of a mutual benefit society has been notified that the lodge will not receive any more money from him because he is no longer a member, his rights will not be prejudiced by a failure to tender payment of assessments subsequently made. *Ibid.*

11. A by-law of a mutual benefit society providing that any member who shall after a certain date enter into the business of selling liquor by retail shall be expelled from the order, applies to a member not actually engaged in the prohibited business at the time mentioned, even though he had been so engaged at the time his certificate was issued. *Ibid.*

12. Where notice and a hearing are required in such a case, by the terms of the insurance contract, before expulsion can take place, affirmative action to that end is essential to forfeit the rights of the beneficiary, so far as such rights depend on mere membership of the insured in the order. *Ibid.*

13. Where the insurance contract expressly provides that there shall be no liability on the beneficiary certificate unless the member shall in every particular comply with all the laws of the order, a violation of any such law by a member *ipso facto* terminates all liability under his certificate. *Ibid.*

14. A by-law of a mutual benefit society providing that any member who thereafter engages in the sale of intoxicating liquors shall be expelled from the order, by necessary implication prohibits members from entering into such business. *Ibid.*

Lightning insurance: Evidence: Instructions.

15. In an action upon an insurance policy to recover for the destruction of mill buildings, alleged to have been caused by lightning, it is *held* that the evidence (stated in the opinion) establishes that the undermining of the buildings by high water caused the loss, and that the circumstances (including the facts that a small portion of

roof and a few shingles were found above where the water had reached, and that some of the timbers were badly broken and splintered, though without marks of fire) relied upon to show that lightning was the cause furnished only a slight basis for speculation and conjecture and did not warrant the submission of the case to the jury. *Clark v. Franklin F. M. F. Ins. Co.* 65

16. An instruction in such case containing the suggestion, not warranted by evidence, that the directors of the insurance company were uncertain as to whether lightning caused the loss or not, and hence that it was proper for them to submit the matter to a jury, is *held* erroneous. *Ibid.*

INSURANCE COMMISSIONER. See INSURANCE, 1.

INTENT. See CRIMINAL LAW, 6, 7, 12. DECEIT, 8–10. LIENS. WILLS, 11.

INTEREST. See DECEIT, 17, 18.

INTOXICATING LIQUORS.

If an adult accompanied by a minor applies to a saloonkeeper for liquor to be drank by him and his associate at his expense, and the saloonkeeper furnishes it for that purpose, and it is drank by the two, the adult treating his companion, the vendor is guilty of *dealing* or *trafficking* in liquor with a minor, within the meaning of sec. 1557, Stats. 1898. *Nelson v. State,* 894

INTOXICATION. See CRIMINAL LAW, 6, 7, 12.

JOINDER.

Of causes of action. See ACTION, 2.

Of parties. See BANKS, 6. BUILDING CONTRACTS, 1. MORTGAGES. TENANCY IN COMMON. TOWNS, 8.

JUDGMENT.

What is a final judgment. See APPEAL, 1, 2. MALICIOUS PROSECUTION, 4, 5.

Of trial court or appellate court? See APPEAL, 25.

Of nonsuit or on merits. See TRIAL, 5.

On award. See ARBITRATION, 2.

In ejectment. See EJECTMENT, 6.

For deficiency. See MORTGAGES, 1, 2.

Against person not served. See MORTGAGES, 1, 2.

As basis of action for malicious prosecution. See MALICIOUS PROSECUTION, 3–5.

Equitable relief against.

Where a judgment gives to a party to a proceeding in which it was entered an unconscionable advantage, the person aggrieved thereby may, by proceeding seasonably, obtain relief in equity by an action bearing directly upon the party to prevent him from enjoying the fruits of the wrong, such action not affecting the judgment or impeaching its validity in any way. *Ludington v. Patton,* 208

As bar to subsequent action. See MORTGAGES, 1, 2.

Conclusiveness of adjudication. See APPEAL, 25–28. BUILDING CONTRACTS, 1. CRIMINAL LAW, 8, 10, 11. EVIDENCE, 2. HIGHWAYS, 2, 3. RAILROADS, 1.

Review and reversal. See APPEAL, 1, 2, 20–25.
Enforcement: Against town. See TAXATION, 2.
Evidence of judgment. See EVIDENCE, 2.
JUDICIAL NOTICE. See MUNICIPAL CORPORATIONS, 1.
JURISDICTION. See APPEAL, 31, 33. COURTS. CRIMINAL LAW, 1. JUSTICES' COURTS. MUNICIPAL CORPORATIONS, 8, 11.

JURY.

See CLERKS OF COURTS, 2, 4, 6. CRIMINAL LAW, 21–23. MUNICIPAL CORPORATIONS, 7.

1. In an action against a city for personal injuries, the plaintiff may ask jurymen whether the fact that as taxpayers they would be called upon to pay a part of any judgment recovered by plaintiff would influence their verdict. *Davey v. Janesville*, 628
2. Signifying satisfaction with the jury as constituted estops a party from questioning on appeal the correctness of a ruling of the trial court overruling his challenge of a juror. *Ibid.*

JUSTICES' COURTS.

See ACTION, 3, 4. APPEAL, 12.

1. Under sec. 4972, Stats. 1898 (providing that if the provisions of different chapters conflict those of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter), the provision of sec. 3737, in the chapter relating to replevin in justice's court, that where the sheriff is a party the warrant and all process in the cause shall be awarded to and executed by a constable, must prevail over more general provisions in other chapters requiring the coroner to serve process and perform all the duties of sheriff when the latter is a party; and, the provision being mandatory, the justice acquires no jurisdiction in a replevin action from service of process by the coroner. *Griswold v. Nichols.* 344
2. Issuance of the warrant to, and execution of it by, the coroner in such a case merely defeats the jurisdiction of the person; and the defect is waived by the voluntary appearance of the defendant. *Ibid.*
3. Where an amendment of the complaint is allowed upon terms in justice's court in violation of subd. 11, sec. 3626, Stats. 1898 (prohibiting the allowance of an amendment after a witness is sworn when an adjournment will thereby be made necessary), the justice does not lose jurisdiction if the defendant accepts the terms and consents to the adjournment. *State ex rel. Posbrig v. Daubner*, 671
4. Where an action had been removed from a justice on the ground of prejudice, and then taken by appeal to the circuit court, the latter court properly permitted the justice to attach his signature *nunc pro tunc* to the jurat of the affidavit of prejudice, under sec. 2830, Stats. 1898, upon proof that the oath had in fact been administered by the justice and that all requirements of sec. 3616 had been met, the oath being sufficient even without an affidavit. *Morrell v. Glasspoole*, 293

LACHES. See COUNTY COURT. EQUITY.
LAND CONTRACT. See ARBITRATION. EJECTMENT, 4.

LANDLORD AND TENANT.

1. A lease of land made on Sunday is void, and in the absence of a subsequent reaffirmance thereof a recovery of rent at the rate stipulated cannot be had from the lessee, without proof that that was the reasonable value of the use and occupation. *Ainsworth v. Williams*, 17

2. Plaintiff, while employed by a railway company as section foreman and living by its permission in the section house, built a lean-to kitchen addition, attached to the house, with the knowledge and consent of the company. Afterwards the company papered and sided the outside of both the section house and the addition. *Held*, that the addition became a fixture which plaintiff could not remove after his discharge by the company and removal from the house. *Mueller v. C., M. & St. P. R. Co.* 800

LIBEL AND SLANDER. See SLANDER.

LICENSE.
To foreign insurance company. See INSURANCE, 1.
To cut timber. See LOGS AND TIMBER, 2.

LICENSE LAWS. See INTOXICATING LIQUORS.

LIENS.

Of mechanics, etc., for labor and materials: Waiver.

1. Sec. 3317, Stats. 1898 (declaring that the taking of a promissory note or other evidence of indebtedness for work or materials shall not discharge the lien therefor unless expressly received as payment therefor and so specified therein), does not change the common-law rule that the taking of independent security is a waiver of the lien if the parties so intended. *Phœnix Mfg. Co. v. McCormick H. M. Co.* 570

2. Where machinery is sold for the purpose of annexation to real property, the intention to waive the right to a lien on the realty is not to be inferred from the mere fact that, before the annexation, the vendor takes a chattel mortgage on the machinery as security for its purchase price. *Ibid.*

Equitable lien of creditors on assets. See CORPORATIONS, 5.

LIGHTNING, Insurance against. See INSURANCE, 15, 16.

LIMITATION OF ACTIONS.

See BANKS, 5. EJECTMENT, 3. EQUITY. WILLS, 7-9.

Subd. 3, sec. 4224, Stats. 1898 (providing that "an action brought by the personal representatives of a deceased person to recover damages, where the death of such person was caused by the wrongful act, neglect or default of another," must be commenced within two years after the cause of action accrued), applies to an action for injuries to the person of the deceased, which survives under sec. 4253, as well as to an action to recover for the benefit of his surviving relatives under secs. 4255, 4256, Stats. 1898. *Staeffler v. Menasha Woodenware Co.* 483

LOGS AND TIMBER.

1. In an action involving the title to timber claimed by each party under a separate grant from the same grantor, a statement in a

stipulation of facts, that the second grantee purchased the right to cut the timber in question without notice of the first grant, when construed in connection with other statements relating to the recording of the first grant and its effect as constructive notice, is *held* not to have been intended to take out of the case the question of constructive notice. *Martin v. Clark*, 493

2. Under the laws of Minnesota as declared in *Pine Co. v. Tozer*, 56 Minn. 288, a grant giving to the grantee the right, for a long period of time, to enter upon, cut, and remove, and when so cut and removed to own, control, and possess, all the merchantable pine timber growing upon certain lands, is a conditional sale of standing timber and a conveyance of an interest in real estate, and not a mere naked license revocable at pleasure. *Ibid.*

MALICE. See DAMAGES, 2. SLANDER, 2, 4, 7.

MALICIOUS PROSECUTION.

See DAMAGES, 3. EVIDENCE, 2.

1. A right of action for malicious prosecution will not accrue to a person till the wrongful action against him shall have proceeded to a final determination in his favor. *Luby v. Bennett*, 613

2. If a complaint, in an action to recover damages for a malicious prosecution, does not state that the wrongful action has been terminated in favor of the plaintiff, it will be open to demurrer for insufficiency. *Ibid.*

3. It is not essential to the maintenance of an action for damages for a malicious prosecution that all the proceedings in such prosecution, proper to be had therein, took place before such action was commenced; it is sufficient if, before the commencement of such action, the issues material to the *bona fides* of the alleged malicious prosecution were decided and closed in favor of the defendant therein by a final judgment. *Ibid.*

4. A judgment in an action which is subject to appeal to a higher tribunal than the one in which it was rendered, is nevertheless final for the purpose of an action to recover damages for the malicious prosecution thereof. *Ibid.*

5. It is not necessary to allege in a complaint, in an action to recover damages for malicious prosecution, that judgment has been rendered in the wrongful action in favor of the defendant therein and that such judgment has not been appealed from or reversed; it is sufficient to allege that judgment has been rendered in the wrongful action in favor of the defendant therein. Subsequent proceedings in such action, impairing the effect of such judgment as a foundation for an action for malicious prosecution, if not disclosed by the complaint, can only be taken advantage of by the defendant as defensive matter. *Ibid.*

6. The general rule which prevails in England, and has the greater support of judicial and elementary authority in this country, is that a civil action, maliciously prosecuted, where neither the person nor the property of the defendant is interfered with inflicting special damages to him, will not sustain an action for malicious prosecution. *Ibid.*

7. An action to wind up a partnership on the ground of misconduct of the defendant partner, and the deprivation of such defendant, in such action, of his right to the possession and enjoyment of the

partnership property, is not a civil action interfering with neither the person nor property of the defendant, within the general rule above stated. On the contrary, it belongs to that class of actions that will sustain an action for malicious prosecution because of the injury to the good name and fame of the defendant therein to an extent not remediable by a mere vindication of him upon the trial and a judgment for costs; moreover, it interferes with his property to all intents and purposes the same as an attachment thereof would, and in such a way that damages, other than those incident to an ordinary civil action maliciously prosecuted, are presumed. *Ibid.*

MANDAMUS.

See APPEAL, 2. INSURANCE, 1. MUNICIPAL CORPORATIONS, 10.

1. *Mandamus* will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application. *State ex rel. Board of Education v. Hunter,* 582
2. Upon the overruling of a demurrer to an alternative writ of *mandamus* the defendant should be allowed to make a return upon terms. *Ibid.*
3. A motion to quash the return to an alternative writ of *mandamus* cannot properly be made. Relator should demur or answer. *State ex rel. Court of Honor v. Giljohann,* 377

MARRIED WOMEN.

A married woman living with her husband and possessing separate property at the time she employed a physician to treat herself and her son is not liable at law (under sec. 2345, Stats. 1898) to pay for such services, even though she intended to charge her separate estate, since the contract did not concern her separate property or business. *Stack v. Padden,* 42

MASTER AND SERVANT.

1. Whether or not employees of the same master are fellow-servants, so that the master is not responsible for an injury to one caused by the negligence of another, does not depend upon the grade or rank of the servants but upon the nature of the service being performed by them in which the negligence occurs. *Wiskie v. Montello Granite Co.* 443
2. A foreman who personally conducts the blasting in a quarry is a fellow-servant of those who assist him in such work, and one of the latter cannot recover for injuries caused by the unexpected explosion, beneath the rock upon which he was at work, of powder which the foreman had negligently permitted to remain there after the partial explosion of a blast. *McMahon v. Ida M. Co.* 95 Wis. 308, distinguished. *Ibid.*

MAXIMS.
Nullus commodum capere potest de injuria sua propria, 257.
Stare decisis, 198, 201.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS. See LIENS.

MEDICINE: Regulation of practice. See CONSTITUTIONAL LAW.
MENTAL SUFFERING. See DAMAGES, 2.
MINORS. See INTOXICATING LIQUORS.
MISTAKE. See APPEAL, 10. ARBITRATION, 6. COUNTY COURT. WILLS, 10.

MORTGAGES.

Of land.

1. In an action to foreclose a mortgage an intermediate purchaser of the land, who had assumed to pay the mortgage debt, was named as a defendant, but the summons was not served upon him. *Held* that, as he was not in fact a defendant in that action, a judgment for deficiency rendered against him therein was invalid and was not a bar to a subsequent action against him to recover the deficiency. *Carpenter v. Meachem*, 60

2. An attempt, in a foreclosure action, to obtain a binding judgment for deficiency against one who had assumed payment of the mortgage debt, which failed because he was not served with process, was not the election of a remedy inconsistent with a remedy by subsequent action at law against him upon the mortgage note. *Ibid.*

3. Failure to serve the summons in a foreclosure action upon a nonresident intermediate purchaser of the land is not fraudulent, where the proceedings are carried on with all the publicity required by the statute. *Ibid.*

Of chattels. See LIENS, 2. REPLEVIN, 1.

MUNICIPAL CORPORATIONS.

Incorporation. See VILLAGES.

General charter: Adoption of parts: Judicial notice.

1. Subd. 9, sec. 31, art. IV, Const., prohibits the legislature from amending the charters of cities, and sec. 32 provides for the adoption of general laws for that purpose. Secs. 925-1 to 925-269, Stats. 1898, embody a general charter law, and sec. 926 provides that any city operating under a special charter may by ordinance adopt any chapter, section, or subdivision of such general charter in addition to or in lieu of the provisions of its special charter, and that such ordinance shall operate to that extent as an amendment of such charter. *Held*, that the court will take judicial notice of the amendment of a special charter by the adoption of such an ordinance. *Davey v. Janesville*, 628

Taxation for schools. See TAXATION, 1.

Officers: Election.

2. Under a city charter providing that in elections by the common council a majority of the votes of the aldermen entitled to seats in the council shall be necessary for a choice, but that "in case of *an equal division* the mayor may give the deciding vote," the mayor can cast the deciding vote only when the votes of all the aldermen are equally divided between two candidates, and not when, though one candidate has received one half of such votes the remaining votes are divided between other candidates. *State ex rel. Nelson v. Mott*, 19

Same: Title to office. See QUO WARRANTO.

Same: Compensation: Unlawful allowance. See OFFICERS.

Ordinances: Pleading.

3. A municipal ordinance may be pleaded by stating its substance and legal effect, without referring to its title or the date of its passage. *Decker v. McSorley,* 91

Same: Animals running at large.

4. An ordinance provided that "no horse . . . shall be permitted to run at large in the city at any time, nor be herded or pastured in or upon any street of said city, nor be permitted to graze or feed in any of said streets, except in such parts of said street as are in front of or adjoining lands owned or occupied by the owner or keeper of the animal grazing or feeding thereon," etc. *Held,* that the exception was not to the prohibition against running at large, but to the prohibition against grazing or feeding, and that to be within the exception the animal must not only be in front of its master's premises, but must also be attended or be securely tethered and not at large. *Ibid.*

5. One purpose of such ordinance was to protect persons from injury, and its violation is ground for a claim of negligence in an action for personal injury inflicted by a horse so running at large. *Ibid.*

Same: Disorderly houses: Penalties: Jury trial.

6. Sec. 3, subch. IV, ch. 86, Laws of 1882, gives the common council of Madison power to enact ordinances for the government and good order of the city, for the suppression of vice and immorality, for the prevention of crime, etc., declaring and imposing penalties, and to enforce the same against any person violating such ordinances. Subd. 1 of the same section grants the power to provide for the abatement of nuisances, and subd. 3 to *suppress and restrain* disorderly houses and houses of ill-fame; and subd. 5 declares houses of ill-fame and disorderly houses to be nuisances. *Held,* that the city has power thereunder to prescribe and enforce a penalty against the keeper of a disorderly house or house of ill-fame. *Ogden v. Madison,* 413

7. A prosecution by the city in such case to recover the penalty imposed by an ordinance against disorderly houses is a prosecution for an offense against a mere police regulation for the good order of the city, and not a prosecution for a misdemeanor, even though the same act constitutes a misdemeanor under the general statutes; and the defendant is not entitled to a jury trial under the constitutional guaranty, but may be proceeded against summarily. *Ibid.*

Streets: Regulation: Telephone companies. See TELEPHONE COMPANIES.

Same: Change of grade: Action by lotowner.

8. Sec. 119 of the charter of Superior (ch. 124, Laws of 1891) provides that "before any established grade shall be changed or any work shall be done on any street, in whole or in part at the expense of the abutting or adjoining real estate, the board of public works shall view the premises and determine the damages and benefits which shall accrue to each parcel of such real estate by such change or alteration of grade." *Held,* that a view of the premises and an assessment of damages is a jurisdictional prerequisite in all cases of change of grade, whether made at the expense of the abutting owner or not. *Jorgenson v. Superior,* 561

9. The provisions of said charter that the persons damaged by a change of grade "shall have a right to recover damages in the manner set

forth" therein, and that the appeal to the circuit court therein provided for shall be the only remedy of the injured lotowner, apply only to cases in which the city is proceeding to make a change within and according to the power conferred by the charter, and do not deprive the injured lotowner of his right to maintain an ordinary action for damages where the city has acted without authority and without starting any proceedings from which an appeal could be taken. *Ibid.*

10. Where the charter of a city gives it power to change established grades of streets, a lotowner affected by a proposed change is not required, at the peril of losing his rights, to watch the proceedings, and, if he discover any departure from the prescribed course of conduct, instantly commence proceedings by *mandamus* or otherwise to keep the city within due bounds. *Ibid.*

11. Where the grade of a street has been changed by a city without jurisdiction or authority, an abutting owner injured by the change is not estopped by mere silence from recovering his damages. *Ibid.*

Same: Defective sidewalks: Action for injuries. See DAMAGES, 4. JURY, 1.

12. In an action against a city to recover for injuries to plaintiff's leg near the ankle, alleged to have been caused by a defect in the sidewalk, a witness who had observed the manner in which plaintiff used her foot in walking after recovery, although not an expert, may testify as to what he saw regarding such use. *Collins v. Janesville,* 348

13. In such a case testimony of a witness that he knew at what place in the sidewalk it was claimed plaintiff was injured is immaterial, but its admission, in view of the other evidence, is *held* not to have been prejudicial. *Ibid.*

14. One of plaintiff's expert witnesses, who had testified to finding some chronic inflammation in the ankle joint was asked if there was usually a recovery from inflammation in the joint within six years counsel stating in effect that he was speaking with reference to such a case as the one under discussion. *Held,* that an objection on the ground that the question did not call for an opinion based on such a case as the one under investigation, was improperly sustained. *Ibid.*

15. The claim being made by defendant that the accident happened by reason of the plaintiff falling from a fence, one of defendant's witnesses was asked a direct question as to whether she did not see the accident happen in that way. On a general objection the question was ruled out. *Held,* that the ruling was proper, the question being leading. *Ibid.*

16. An instruction to the effect that if a child, while using the sidewalk in going from one place to another, incidentally indulges in some play or pastime, but is not thereby diverted from going straight to her destination, she is a traveler in the eye of the law, and that if plaintiff was using the walk in going directly from her home to a neighbor's, as she claims, and at the same time was accompanied by children who were playing, but she did not stop to play with them, or if she was engaged in any pastime incidentally but was not thereby diverted from going straight to her destination, she was a traveler, is *held* not to have been erroneous, especially where followed by an instruction that "if, on the other hand, you believe and find that she started from her home to her neighbor's and was diverted from this purpose and stopped to play with other children, and she was injured on the sidewalk while engaged in playing, she cannot recover." *Ibid.*

17. If a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent; but the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of the plaintiff's contributory negligence. *Ibid.*

18. Where the plaintiff in an action to recover for injuries caused by a defective sidewalk knew of the defect, the error in giving instructions applicable to a case where such knowledge was wanting is *held* not to have been cured by an instruction that if a person knows of a dangerous defect in the sidewalk he must use greater care than if he is ignorant thereof. *Ibid.*

Claims: Disallowance. See APPEAL, 31–33.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 1, 9–14.

NEGLIGENCE.

See ANIMALS. BRIDGES, 1–4. DECEIT, 2, 11. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 5, 16–18.

1. Absence of a strong, healthy boy, four and one-half years old, from home, unattended, upon a residence street, in the daytime, is insufficient of itself to warrant a holding that his parents were guilty of negligence as matter of law. *Decker v. McSorley,* 91

2. In an action to recover damages for negligence and unskilfulness in shelling popcorn, by reason of which it was rendered unfit for popping and worthless except for feed and was returned from Chicago where it had been shipped, evidence that corn from the same crib, raised the same year, and in the same condition, had been shelled in good condition for popping by other parties with cornshellers of the same or similar construction, and that the corn so shelled had been accepted in Chicago and had popped well, was admissible as tending to prove that the corn shelled by defendant might, with proper care, have been shelled so as to be fit for popping. *Chase v. Blodgett Milling Co.* 655

3. Defendant's foreman testified that, in plaintiff's presence, before beginning the work, he adjusted the rollers of the sheller, which were then closed, so that they were opened as wide as possible. Plaintiff's evidence tended to show that the adjustment had been changed after a portion of the corn had been shelled. *Held,* that it was not error to refuse to allow the foreman, after being recalled, to testify as to how the rollers were before he first adjusted them. *Ibid.*

4. Where a witness had testified to hearing a remark made by plaintiff to the foreman in defendant's mill, and other witnesses had testified fully as to the amount of noise and difficulty of hearing in the mill, it was not error to refuse to allow the foreman to testify as to whether the remark could have been heard by such witness. *Ibid.*

5. A refusal to instruct that "if the plaintiff was present when the corn was shelled, and saw some of it, and had an opportunity to examine all of it, and afterwards took possession of all of it, and removed it from the mill of the defendant, and then paid for the shelling, and made no objection to it on account of its being broken or injured in shelling, such taking possession of the corn and removing it was an acceptance of the corn, and he cannot re-

cover in this action any damages for the broken condition that was apparent when he removed it," is *held* not to have been erroneous where there was evidence tending to prove that three bags of the corn shelled by defendant were in a proper condition for popping; that the balance (about thirty bags) was badly cracked; and that plaintiff's examination was confined to the three bags which were good. *Ibid.*

6. An instruction that ordinary care means "such care as a person of ordinary prudence and skill would usually exercise under the circumstances," is *held* not erroneous. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILL AND NOTES.

NEW TRIAL.

Except in case of a clear abuse of judicial discretion, an order granting a new trial because of newly discovered evidence will not be disturbed on the ground that the excuse given for not producing such evidence upon the trial was insufficient. *Martin v. Clark*, 493

NONSUIT. See APPEAL, 22, 24.

NOTICE.
Of trial. See APPEAL, 32. TRIAL, 1.
To complete work. See BUILDING CONTRACTS, 2.
Of time to present claims. See DESCENT.
Of purposes of corporation. See INSURANCE, 6.
Of rights in standing timber. See LOGS AND TIMBER.
Of agent's acts. See PRINCIPAL AND AGENT, 2.

OBSTRUCTIONS. See HIGHWAYS, 2, 3.

OFFICERS.

Election. See MUNICIPAL CORPORATIONS, 2.

Title to office. See QUO WARRANTO.

Compensation: Unlawful allowance: Recovery.

If a public officer receives from a municipal corporation compensation in addition to that authorized by law for services within the scope of his official duties or which are voluntarily performed as such officer, he obtains no title thereto and the same may be recovered by the corporation in an action for money had and received. *St. Croix Co. v. Webster*, 270

When mandamus lies. See MANDAMUS. INSURANCE, 1.

Insurance commissioner. See INSURANCE, 1.

Sheriffs and constables. See ATTACHMENT. JUSTICES' COURTS, 1, 2. REPLEVIN.

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Appealable and reviewable. See APPEAL, 1–3, 12, 18.
Setting aside. See COUNTY COURT.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1, 3–7.

PARENT AND CHILD. See DEATH. NEGLIGENCE, 1. WILLS, 1, 2, 16, 17.

PARTIES.

See ACTION, 1, 2. APPEAL, 4. BANKS, 6, 8. BUILDING CONTRACTS, 1. HIGHWAYS, 2. MORTGAGES. QUO WARRANTO. TENANCY IN COMMON. TOWNS, 3.

Under sec. 2604, Stats. 1898 (providing that one or more may sue for the benefit of the whole where the question is one of common or general interest to many persons), a retail coal dealer who is one of many persons injured by an unlawful combination between other coal dealers to drive out of business all not members of the combination, may maintain an action for the benefit of all similarly situated to restrain the continuation of the operations of the conspiracy. *Hawarden v. Youghiogheny & L. C. Co.* 545

PARTNERSHIP. See MALICIOUS PROSECUTION, 7.

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See APPEAL, 14, 32. BANKS, 8. CONTRACTS, 1. CORPORATIONS, 8. DAMAGES, 3. DECEIT, 1, 22. MALICIOUS PROSECUTION, 2, 5. MANDAMUS, 2, 8. MUNICIPAL CORPORATIONS, 3. PUBLIC LANDS, 8. RAILROADS, 4, 5. SLANDER, 5. TOWNS, 4. VILLAGES, 1.

1. As a general rule, subject to exception in case of a plea of former action pending, a plea in abatement is effective if shown to have been true when made. *Winneconne v. Winneconne,* 10

2. Where a complaint states a good cause of action it will not be held bad on demurrer, merely because greater relief is demanded than the plaintiff is entitled to. *Siegel v. Liberty,* 470

3. A pleading cannot legitimately be subjected to any technical or narrow reading or construction for the purpose of determining its sufficiency, nor can it be condemned because all the essential facts are not clearly alleged without resort to inference. *Benolkin v. Guthrie,* 554

4. In an action to recover for personal services alleged to have been performed for defendant, at its special instance and request, at an agreed price per day, plaintiff offered in evidence a contract by which third persons agreed to do certain work for defendant and the latter agreed to pay all laborers employed by them. *Held,* that it was error to admit such evidence without amendment of the complaint and giving defendant an opportunity to say whether it was prepared to go on with the trial under the changed conditions. *Bean v. Percival M. Co.* 598

POLICE POWER. See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 6, 7. TELEPHONE COMPANIES, 2–7.

POSSESSION of land. See EJECTMENT.

PRACTICE. See ACTION. APPEAL. ATTACHMENT, 2. CERTIORARI. CLERKS OF COURTS. CRIMINAL LAW. EVIDENCE. JUDGMENT. JURY. JUSTICES' COURTS. MANDAMUS, 2, 3. NEW TRIAL. PARTIES. PLEADING. QUO WARRANTO. TRIAL.

PRECATORY TRUST. See WILLS, 1.

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PRESUMPTION. See APPEAL, 6. BANKS, 10. CORPORATIONS, 8. CRIMINAL LAW, 21, 22. MUNICIPAL CORPORATIONS, 17. PRINCIPAL AND AGENT, 2. SLANDER, 6. TRUSTS, 2. VENDOR AND PURCHASER. WILLS, 11.

PRINCIPAL AND AGENT.

See BROKERS. EJECTMENT, 5.

1. In an action upon accounts for goods claimed to have been sold to defendant through two persons, severally, who were alleged to have been his agents, the evidence as to the agency of each was different, and the fact of the agency or nonagency of one had no bearing upon the accounts incurred by the other. *Held*, that it was confusing and therefore error to charge the jury that if defendant authorized said persons "or either of them" to secure the goods, or if he held them out, "or one of them, as his agents or agent to incur these debts, or some of them," they must find for plaintiffs. *Chase v. Dodge*, 70

2. A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby. *Andrews v. Robertson*, 334

3. The holder of a promissory note, taken for him of the maker by an agent upon a condition not disclosed to such holder and outside the scope of the agency, cannot repudiate the condition and insist upon holding and enforcing the note. He is bound, if he does not intend to abide by such condition, to restore or offer to restore the note within a reasonable time after discovering the facts. *Ibid.*

PRINCIPAL AND SURETY.

See BILLS AND NOTES, 2–4. BUILDING CONTRACTS.

No matter what form a contract may take, if the fact that one of several obligors thereto is a surety merely, as between himself and his co-obligors, is brought to the knowledge of the creditor, he owes to such surety the duty of having no transactions or dealings with the principal debtors which shall vary the former's position or prejudice him. *Omaha Nat. Bank v. Johnson*, 372

PRINTED CASE. See APPEAL, 29, 30.

PROCESS. See JUSTICES' COURTS, 1, 2. MORTGAGES.

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See BRIDGES, 2. TRIAL, 8.

PUBLIC LANDS.

1. If the land laws of the United States confer upon a person a right to public land upon the existence of certain facts, the right becomes fixed when those facts are found to exist by the proper executive officer. If, therefore, a patent is issued to one person when upon the facts so found another is entitled to the land, ultimate rights will not be changed thereby, but the patentee will be considered by the courts to hold in trust for him to whom the land in equity belongs. *McCord v. Hill*, 499

2. In an action to charge a trust upon the patentee of public land, it is *held* that certain proofs which were found by the interior department to have been tainted with fraud were merely the sup-

plemental proofs offered by a homestead entryman after his original proofs had been declared premature, and that such fraud did not debar him from taking advantage of the curative act of June 3, 1896. *Ibid.*

8. In such a case it is sufficient for the plaintiff to allege absence of any testimony or proof on a given subject before the officers of the land department, without setting out the testimony in full, and upon demurrer such allegation must be given literal effect, leaving the plaintiff to make proof thereof according to the ordinary rules of evidence. *Ibid.*

4. The provision of the act of June 3, 1896, that "whenever it shall appear to the commissioner of the general land office that" certain facts with reference to a premature commutation of a homestead entry exist, the certificate of entry of the homesteader shall be in all respects confirmed to him, etc., was not intended to create the commissioner into a special tribunal having exclusive jurisdiction to pass upon the existence of the facts necessary to relief under the act, but was intended merely to provide, *in pari materia* with the other land laws, for an examination and decision of those questions by the land department, presided over by the secretary of the interior, and in which said commissioner and all other officers are but subordinates of the secretary, subject to his direction, control, and supervision. *Ibid.*

5. Under the provision of said act of June 3, 1896, requiring as a condition of the commutation "six months' actual residence in good faith by the homestead entryman prior to such confirmation," etc., the six months' residence need not have been subsequent to entry, but merely prior to final proof. *Ibid.*

6. A preference right of entry based on a contest, given by ch. 89, Laws of U. S. 1880, is a mere privilege to enter and not an entry or a re-entry within the meaning of the act of June 3, 1896, excluding a homestead or commutation entry from the benefit of its curative provisions where the original entry had been canceled and the land made vacant had been re-entered under the homestead act. *Ibid.*

PUBLIC SCHOOLS. See TAXATION, 1.

PUNCTUATION. See STATUTES, 3.

PUNITORY DAMAGES. See SLANDER, 3, 4, 7.

RAILROADS.

Condemnation of land: Streets: "Assumption" of obligations.

1. The decision in a condemnation proceeding instituted by one of several persons similarly situated and injured by the construction of a railroad in a street, is not conclusive, as *res judicata*, in a similar proceeding by another of such persons, but is authoritative under the rule of *stare decisis*. *Lenz v. C. & N. W. R. Co.* 198

2. Although sec. 1296*a*, Stats. 1898, giving to an abutting lotowner a right to compensation for injury from the construction of a railroad in the opposite side of the street, gives right of condemnation only to the railroad company, the lotowner may nevertheless institute condemnation proceedings under sec. 1852 where the company delays or omits to do so. *Ibid.*

3. The "assumption" by the grantee, as part of the consideration for the conveyance of railroad property, of all the existing debts, liabilities, and obligations of the grantor company, includes a promise to discharge each debt or liability to the same person and in

the same manner as the grantor was bound to do. Such promise evinces an intent to benefit the creditors, and they may sue directly thereon. *Ibid.*

4. Sec. 1846, Stats. 1898, being framed to regulate condemnation proceedings instituted by a railroad company, is not literally applicable to a proceeding instituted by a property owner under sec. 1852 to secure compensation for land already taken; and in such case the ordinary rule as to liberality in the construction of pleadings should apply. *Ibid.*

5. In such a proceeding, however, the petition, findings, and judgment should be so definite as to leave no uncertainty as to the land affected or the rights of the company therein. In this case a certain lack of definiteness and specification, which might have been cured had proper objection been made, is *held* not so great, when the finding is construed in the light of the entire record, as to be prejudicial to the appellant company. *Ibid.*

REAL-ESTATE AGENTS. See BROKERS.

REAL PROPERTY. See ARBITRATION. BROKERS. CORPORATIONS, 8. EJECTMENT. HIGHWAYS, 2, 3. LANDLORD AND TENANT. LIENS. LOGS AND TIMBER. MORTGAGES. PUBLIC LANDS. RAILROADS. TENANCY IN COMMON. VENDOR AND PURCHASER. WILLS.

QUO WARRANTO.

Under sec. 8466, Stats. 1898, an action of *quo warranto* against a person usurping the office of school commissioner in a city may be brought in the name of the state by a private person. *State ex rel. Nelson v. Mott*, 19

RECEIVERS. See BANKS, 2, 3.

RECORD on appeal. See APPEAL, 5–10, 17.

RECORDS: Evidence. See CRIMINAL LAW, 4. EVIDENCE, 3.

REMAINDERS. See WILLS, 1, 2.

REMOVAL of cause. See JUSTICES' COURTS, 4.

REPLEVIN.

See JUSTICES' COURTS, 1, 2.

1. A constable seized under a writ of attachment a stock of goods upon which there was a chattel mortgage. Subsequent to the levy the mortgagor claimed her exemptions, which were selected but delivery thereof was refused. Thereafter the mortgagee demanded possession of the property under the mortgage. Before the latter had changed her attitude the mortgagor brought replevin against the constable for the goods selected as exempt. *Held*, that the plaintiff could not recover, since the defendant established the superior right of a third person to the goods at the time of the commencement of the action, and connected himself with such person. *Stern v. Riches*, 589

2. An officer holding a writ of attachment levied at the same time upon a horse and wagon which were clearly exempt and upon a stock of merchandise from which the debtor was entitled to select certain exemptions. Although he caused an appraisal to be made and permitted the debtor to select such exemptions, he refused to deliver up the articles selected upon demand. The debtor thereupon commenced an action to recover them, and the next day commenced an independent action to recover the horse and wagon. *Held*,

that the debtor's right to recover all the exempt property was single and that but one action therefor could be maintained. *Stern v. Riches*, 591

RESCISSION. See BANKS, 1-8. CONTRACTS.

RES JUDICATA. See APPEAL, 25-28. CRIMINAL LAW, 2. RAILROADS, 1.

RETURN. See CERTIORARI. MANDAMUS, 2, 3.

REVERSAL. See APPEAL, *Affirmance and Reversal.*

REVOCATION. See WILLS, 16, 17.

ROAD MACHINE. See TOWNS.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 8-18. TELEPHONE COMPANIES. TOWNS.

RULES OF COURT.
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Of standing timber. See LOGS AND TIMBER.
Of land. See BROKERS. CORPORATIONS, 8. LOGS AND TIMBER. PUBLIC LANDS. RAILROADS, 3. VENDOR AND PURCHASER.

SCHOOLS. See TAXATION, 1.

SERVICE OF PROCESS. See JUSTICES' COURTS, 1, 2. MORTGAGES.

SHERIFFS AND CONSTABLES. See ATTACHMENT. JUSTICES' COURTS, 1, 2. REPLEVIN.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 12-18.

SLANDER.

1. While defendant's counsel in an action for slander was opening the case the court ruled that he would not be permitted to show trouble between defendant and one of plaintiff's witnesses, but, upon argument, immediately withdrew the ruling and reserved the question until the witness was called, when no adverse ruling was made. *Held*, not prejudicial. *Hacker v. Heiney*, 313
2. Objection to evidence of substantial repetitions of a defamation at times other than those specified in the complaint being first made during the opening argument, the court ruled that such evidence was admissible only as tending to prove express malice. *Held*, that if the defendant desired such restriction further impressed upon the jury, a request therefor should have been made. *Ibid.*
3. A witness should not be permitted to testify to his understanding of words charged as slander. In this case, however, the words as to which the witness testified not having been charged as slander in the complaint, but being merely one of several repetitions, offered as tending to show malice and having relation to the question of exemplary damages, and the trial court having required remission of $1,000 of the $1,600 damages awarded, the error, if any, in admitting such testimony is *held* not prejudicial. *Ibid.*
4. An award of $600 damages for repeatedly charging a virtuous and reputable married woman with whoredom is not excessive, especially where the jury might have found express malice and awarded punitory damages. *Ibid.*
5. In an action against a married woman for charging plaintiff with whoredom, testimony that years of ill health had caused defendant

to be very jealous of her husband is admissible, if at all, only as tending to mitigate damages, and not for that purpose unless the fact is properly pleaded. *Ibid.*

6. Oral charges of unchastity being actionable *per se*, the presumption arises, without proof, that the person defamed suffered those general damages which are the natural and necessary result of such wrong, i. e. injury to her reputation, and mental pain and humiliation; and such presumption is not overcome by evidence that two of the four hearers disbelieved the charge,—nonbelief of the hearers being merely a fact to be taken into consideration by the jury in awarding damages. *Ibid.*

7. Where there are numerous repetitions of a defamatory charge, the question of express malice and punitory damages is for the jury. *Ibid.*

8. A charge of whoredom against a virtuous and reputable woman necessarily subjects her to anguish of mind and humiliation, and the court may properly so instruct the jury. *Ibid.*

9. Where, in an action to recover damages for charging plaintiff with unchastity, no claim was made, either in the pleadings or proof, that plaintiff was other than the most virtuous, or that defendant had any ground whatever to doubt her chastity, statements of plaintiff's counsel in his argument to the jury that a verdict in defendant's favor would mean virtually that plaintiff was a whore, are *held* to have been an abuse of the privilege of counsel, but to have been so obviously untrue that the jury could not have been misled thereby. *Ibid.*

SPECIAL VERDICT. See DECEIT, 2, 5, 6. HIGHWAYS, 1.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. VILLAGES, 8.

1. Statutes will not be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. *State ex rel. Kellogg v. Currens,* 431

Retrospective. See VILLAGES.

General or special. See VILLAGES, 8.

Amendment: Judicial notice. See MUNICIPAL CORPORATIONS, 1.

Repeal by implication. See INSURANCE, 1.

Construction. See ACTION. APPEAL, 2, 12, 31, 33. ARBITRATION, 1. ATTACHMENT, 2. BANKS, 5, 8. BRIDGES, 1–3, 5. CLERKS OF COURTS. CORPORATIONS, 2. CRIMINAL LAW, 1, 2. DESCENT. EJECTMENT, 3, 6. EVIDENCE, 4. INSURANCE, 1–8. INTOXICATING LIQUORS. JUSTICES' COURTS. LIENS, 1. LIMITATION OF ACTIONS. MARRIED WOMEN. MUNICIPAL CORPORATIONS, 1, 2, 6–10. PARTIES. PUBLIC LANDS, 1, 4–6. RAILROADS, 2, 4. QUO WARRANTO. TAXATION. TELEPHONE COMPANIES, 1–3, 6. TOWNS, 2. VILLAGES, 3. WILLS, 2, 7–9, 16, 17.

2. Strict construction of a penal statute permits sensible construction, having in view the purpose of the law; and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof. *Nelson v. State,* 394

3. Punctuation or the lack of it cannot be allowed to override plain rules for the construction of statutes. *Jorgenson v. Superior,* 561

4. Qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent unless the context or the evident meaning of the enactment requires a different construction. *Ibid.*

Conflict: Special provisions prevail over general. See JUSTICES' COURTS, 1.

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SURVIVORSHIP. See DECEIT, 16.

TAXATION.

See TOWNS.

1. Whether or not secs. 1074–1076, Stats. 1898, authorize the levy by the county board of a school tax upon a city authorized by law to levy its own school taxes (a question not determined), if the taxpayers voluntarily pay a tax so levied it becomes a part of the school funds and should be dealt with by the treasurer as such. *State ex rel. Board of Education v. Hunter*, 582

2. A tax levied to pay a judgment against a town is a tax in the ordinary sense of the term and not a special assessment, and no individual liability to the judgment creditor on the part of the taxpayer is created thereby. Such a tax is therefore within the provision of sec. 1114, Stats. 1898, that taxes returned as delinquent shall belong to the county and be collected for its use; and the judgment creditor cannot compel the payment to him of any portion of the delinquent taxes collected by the county treasurer. *State ex rel. Bank of Commerce v. Bell*, 601

3. All sums received by a town treasurer upon the levy of county taxes and retained by him in place of the returned delinquent town taxes are collected by him upon the latter. *Ibid.*

TAXATION OF COSTS. See APPEAL, 13, 30.

TAXPAYERS.
As jurors. See JURY, 1.
Actions by. See TOWNS.

TAX TITLES. See EJECTMENT, 5.

TELEPHONE COMPANIES.

1. The word "highway," as used in sec. 1778, Stats. 1898 (authorizing any telephone company to construct its lines along any public highway), covers the streets and ways of a city, as well as rural highways. *State ex rel. Wis. Telephone Co. v. Sheboygan*, 23

2. Sec. 1778, Stats. 1898, grants to telephone companies a franchise to use the streets, and although a city may, under its charter, have power to regulate such use, yet its consent to the construction of a telephone line on certain streets is necessary only in view of such right to regulate, and the giving of such consent is not the granting of a franchise within the meaning of sec. 940*b*, Stats. 1898. *Ibid.*

3. Under its police power to control and regulate the use of its streets, a city may provide by ordinance that the location of all poles shall be subject to the approval of the proper city authorities, and that the further occupation of the streets shall be upon a plan to be approved by the council; but it cannot, under the pretense of regulating, take away entirely the right of a telephone company, under sec. 1778, Stats. 1898, to construct its lines on the streets of the city. *Ibid.*

4. When a telephone company submits for the approval of the proper authorities, under such an ordinance, its plans for construction of lines in the streets, it is the duty of such authorities to take affirmative action recognizing the company's right; and they cannot justify a refusal to act upon the ground that the streets are already incumbered by poles and wires and that a change to an underground system should be made "as soon as possible." *Ibid.*

5. A city has only such powers with respect to the wires and poles of a telephone company in its streets as have been granted to it by the legislature. *Ibid.*

6. Under charter provisions empowering a city to enact proper ordinances and regulations for the government and good order of the city, for the benefit of trade and commerce, to prevent the incumbering of streets, and to regulate the manner of using streets and protect them from injury, the city has no power to impose any conditions upon the use of its streets by a telephone company except such as may fairly be said to be police regulations. It cannot require the company to accept an ordinance fixing the rates to be charged for telephone service; nor can it exact financial benefits to itself, such as a right to purchase the company's exchange, a right to use the tops of the poles for a fire-alarm system, free of charge, or a right to take the company's property by forfeiture in case of nonuse. *Ibid.*

7. Nor has the city, in such a case, the right to refuse to act upon the plans of the telephone company submitted for approval, and thus prevent the construction of the proposed lines, on the ground that ruinous competition in telephone rates would result. Its power to regulate trade and commerce does not extend to controlling competition. *Ibid.*

TENANCY IN COMMON.

1. If a cotenant or his licensee destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong, whenever such a remedy would exist in the absence of the cotenancy. *Sullivan v. Sherry*, 476

2. Where property held in common has been converted by a stranger with the permission of one of the cotenants, the latter is not a necessary party to an action for the conversion. *Ibid.*

TITLE TO LAND. See ARBITRATION. EJECTMENT. HIGHWAYS, 2, 3. LANDLORD AND TENANT, 2. LOGS AND TIMBER. PUBLIC LANDS. RAILROADS. TENANCY IN COMMON.

TORTS. See ANIMALS. ATTACHMENT. BRIDGES, 1–4. CONSPIRACY. CORPORATIONS, 3. DAMAGES. DEATH. DECEIT. HIGHWAYS, 1. MALICIOUS PROSECUTION. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 8–18. NEGLIGENCE. REPLEVIN. SLANDER. TENANCY IN COMMON.

TOWNS.

See BRIDGES. HIGHWAYS. TAXATION, 2, 3.

1. A complaint alleging that plaintiff is a property owner and taxpayer in a road district of the defendant town; that a contract had been made for the purchase of a road machine for his road district together with another district, involving the expenditure of $225, to be raised by taxation of said districts; and that the contract was made without the petition required by law to be filed before the making of such a contract,—states a cause of action to prevent the carrying out by a municipal corporation of an illegal contract involving the increase of taxation or the unlawful expenditure of public funds. *Siegel v. Liberty*, 470

2. Under ch. 83, Laws of 1899 (providing that in certain towns the chairman of the town board may, upon presentation of the prescribed petition, purchase a road machine for a road district or districts, which shall be paid for out of the highway taxes of said districts; that a copy of the contract shall be filed with the town

clerk; and that the amount thereof shall be audited by the town board of audit and paid by direct tax levied by the town board on said district or districts, as other town charges are levied and collected), a contract made by the chairman of the town board for the purchase of a road machine for certain road districts in his town is in legal effect the contract of the town in its corporate capacity. *Ibid.*

8. The town and the vendor of the road machine in such case are the only necessary parties defendant to an action to set aside the contract, since the chairman of the town board is not personally bound by the contract, and the road districts are not corporate bodies. *Ibid.*

[4. Whether in such a case a complaint which does not allege that the illegal tax has been placed upon the tax roll, or that any attempt has been made to collect it, states a cause of action to enjoin its collection, doubted but not determined.] *Ibid.*

TRIAL.

Notice of trial: Waiver of irregularity. See APPEAL, 32.

1. The irregularity of a premature notice of trial is waived if, after the objection is overruled, the party goes to trial on the merits. *Davey v. Janesville,* 628

Proceeding with trial: Discretion.

2. After disposing of a motion in a cause which is upon the calendar under due notice of trial, it is within the discretion of the court to proceed with the trial of the remaining issues, notwithstanding the prohibition against taking oral evidence on a motion. *Gager v. Paul,* 638

Consolidation of actions for trial. See ACTION, 3, 4.

Selection of jury. See JURY.

Reception of evidence. See APPEAL, 23, 24. EVIDENCE.

3. Where an objection to evidence is properly made the trial court should decide the question presented according to principles of law as it understands them, and should not admit the evidence because counsel is willing to take his chances of reversal on appeal. *Collins v. Janesville,* 348

4. Refusal of the trial court to reopen the case for further examination of the plaintiff with reference to a transaction between her and the defendant tending to show malice, on the ground that ample opportunity to obtain the desired information had been already given and that the attempt had been fruitless, is *held,* under the circumstances of this case, to have been a proper exercise of discretion. *Lauterbach v. Netzo,* 326

Findings by court.

5. In an equitable action, upon a motion to dismiss at the close of plaintiff's testimony, the proper practice is to make findings and render judgment on the merits. *Spuhr v. Kolb,* 119

6. Findings of fact should always be made in an action tried by the court. *Barlass v. Kargus,* 611

Taking case or question from jury. See APPEAL, 19. CRIMINAL LAW, 16–20, 24. DECEIT, 2, 4, 9, 10, 17. EJECTMENT, 1. INSURANCE, 15. NEGLIGENCE, 1. SLANDER, 7.

Arguments to jury. See APPEAL, 21. SLANDER, 9.

7. A ruling of the court in respect to remarks of counsel, tending to convey to the jury the idea that a party might have offered in evidence letters written by himself containing self-serving declarations, is *held* erroneous. *Shaw v. Gilbert*, 105

Instructions to jury. See DECEIT, 2, 3, 12. HIGHWAYS, 1. INSOLVENCY, 4. INSURANCE, 16. MUNICIPAL CORPORATIONS. 16, 18. NEGLIGENCE, 5, 6. PRINCIPAL AND AGENT, 1. SLANDER, 2, 8.

8. In one part of a charge attempting to define "proximate cause" the use of the word "not" rendered the instruction the exact reverse of what it should be, and the element of natural and probable consequence, contained in another part of the charge, was omitted. *Held*, that the whole charge on the subject was confusing and calculated to mislead the jury. *Decker v. McSorley*, 91

9. Except in case of the omission of any instruction whatever upon vital issues, error cannot be assigned upon refusal to give an instruction unless it was formally requested in writing. *Hacker v. Heiney*, 313

10. The refusal to give an instruction requested is not error where it is given in substance in the general charge. *Collins v. Janesville*, 348

Separation and misconduct of jury. See CRIMINAL LAW, 21-23.

New trial. See NEW TRIAL.

TRUST-FUND DOCTRINE. See CORPORATIONS, 5.

TRUSTS AND TRUSTEES.

See WILLS, 1-15.

1. If a trustee deals with his *cestui que trust* to the disadvantage of the latter, such *cestui que trust* can repudiate the transaction upon discovering the fraud, hold the trustee responsible for damages for the wrong, or charge him upon a constructive trust of any property wrongfully obtained. *Ludington v. Patton*, 208

2. In all cases where a trustee by contract with his *cestui que trust* obtains the interest of the latter in the subject of the trust, the transaction is presumed to be fraudulent and void, casting upon the trustee the burden of affirmatively showing, clearly, that the two acted at arm's length in the transaction or that it was to the advantage rather than to the disadvantage of the *cestui que trust*, and that he was given all the information possessed by the trustee, and that the latter acted in the utmost good faith. *Ibid.*

3. The disability of a trustee to deal for his own gain with his *cestui que trust* in respect to the subject of the trust, extends to any such dealing for the benefit of others. *Ibid.*

4. No man can take advantage of his position as trustee to deal with his *cestui que trust* to the disadvantage of the latter and successfully challenge a court of conscience to remedy the mischief thereby accomplished, if it be seasonably invoked. *Ibid.*

UNDERTAKING. See APPEAL, 31, 33.

USE AND OCCUPATION. See LANDLORD AND TENANT, 1.

VARIANCE. See PLEADING, 4.

VENDOR AND PURCHASER OF LAND.

See ARBITRATION. EJECTMENT, 4. LOGS AND TIMBER. RAILROADS, 3.

It having been for many years the settled law that an agreement, by the grantee in a conveyance, to assume a debt of the grantor con-

fers a right of recovery upon the third party creditor against the grantee, it must be presumed that the parties to such an agreement intended that result. *Lenz v. C. & N. W. R. Co.* 198

VERDICT. See DECEIT, 2, 5, 6. HIGHWAYS, 1.

VILLAGES.

1. An action was commenced against a village alleged to have been duly incorporated, but it pleaded in abatement its nonexistence as a corporation because the statute under which it had attempted to incorporate was unconstitutional. Afterwards, before the trial, a curative act was passed, declaring all villages theretofore attempted to be incorporated under said invalid act to be duly incorporated. *Held*, that the plea in abatement was not thereby rendered ineffective. *Winneconne v. Winneconne*, 10

2. Although it is recited in such case that at the trial, after the passage of the curative act, the defendant appeared by its attorney, this must be held to refer to the original supposed defendant, in the absence of anything showing that the village created by the curative act had been brought or had voluntarily come into court; and the action was properly dismissed. *Ibid.*

3. By ch. 5, Laws of 1897, all villages theretofore attempted to be incorporated under certain void statutes are declared to be and to have been duly incorporated, and to have all the powers of duly incorporated villages, and all duties, obligations, and liabilities assumed by any of said villages, and all causes of action existing against them, are declared valid and efficient to the extent that the same would have been of force had their organizations been regular and the acts under which they were organized valid. *Held:*

(1) The act, being applicable to a class, is a general law.

(2) The language declaring the villages *to have been* duly incorporated is ineffective, so far as it is retrospective or purports to declare the attempted incorporation valid *ab initio*.

(3) The act is an exercise of the power of the legislature, under sec. 3, art. XI, Const., to create municipal corporations; and it was competent for it to provide, as a part of the act of creation, that they should pay the just debts and obligations supposed to have been duly incurred by the voluntary and unauthorized organizations to whose property they succeed. *Winneconne v. Winneconne*, 13

VOLUNTARY APPEARANCE. See JUSTICES' COURTS, 2.

WAIVER.
Of errors. See APPEAL, 21, 22.
Of notice. See BUILDING CONTRACTS, 2.
Of objections. See JURY, 2. JUSTICES' COURTS, 8.
Of lien. See LIENS.
Of irregularities. See TRIAL, 1.

WILLS.

Probate: Pleading. See APPEAL, 14.

Construction: Life estate: Precatory trust: After-born children.

1. A will gave all the testator's property to his wife, but stated that it was his wish that such property "or so much thereof as my said wife may be possessed of at her decease shall go to or be by her given to our child or children, if any there be then living." At

his death the widow was of an age rendering a second marriage among the probabilities. He left three minor children, two being girls and the youngest a boy, two of whom were born after the execution of the will. The estate was so large that the testator must have expected that the income thereof, under proper management, would exceed the amount necessary to support his widow in comfort during her life and provide for the support and education of the children. *Held*, that the will should be read as intending to give the property to the widow for life, with remainder over to such of testator's children as should survive her, and making her a trustee of the property so far as required to effect that purpose. *Swarthout v. Swarthout*, 102

2. If such will were construed to give the widow the whole estate absolutely, it could not be sustained as against the two children born after its execution. [Whether, when construed as giving a contingent remainder to such children, it makes a "provision" for them, within the meaning of sec. 2286, Stats. 1898, not determined.] *Ibid.*

Trustees: Fraud: Preventing election by widow: Accounting.

3. One to whom land has been devised absolutely cannot be charged with a trust therein in favor of another, by parol evidence as to the testator's wishes, not showing that the execution of the will in that form was procured or induced by fraud. *Duncan v. Duncan*, 75

4. Upon the facts in this case it is *held* that the executors and trustees under a will were trustees for the testator's widow as regards her statutory rights in the estate, and that, independent thereof, they occupied a position of trust and confidence towards her. *Ludington v. Patton*, 208

5. The executors and trustees did not owe the widow any duty to inform her of her legal rights in the estate of her husband or the value thereof, or how to secure the same, so long as they made no effort to extinguish such rights by purchase or otherwise but remained passive in the matter. *Ibid.*

6. When they approached the widow to extinguish her legal rights in the estate by purchase, they owed the same duty to her to disclose everything within their knowledge affecting her rights as any trustee owes to his *cestui que trust* under similar circumstances. They should have fully disclosed to her all the knowledge which they possessed and should not have bought in her interest in the estate to her disadvantage. *Ibid.*

7. The statute giving to a widow one year after the filing of the petition for the probate of her husband's will, within which to elect to take the provision out of her husband's estate made for her by law, is a statute of limitations, and when it has fully run against her it extinguishes her statutory widow's rights beyond the power of legal or equitable remedies to relieve her, in the absence of fraud entitling her to relief upon the ground of equitable estoppel. *Ibid.*

8. The statute of limitations (sec. 4222, Stats. 1898) commenced to run from the time the widow knew of the fraud constituting the ground of her cause of action or might have known thereof by the exercise of ordinary care. *Ibid.*

9. The trustees being chargeable with having created in the mind of the widow the impression that she was dependent upon the heirs for any addition she obtained to the provision made for her by her husband, sec. 4222, Stats. 1898, did not commence to

run against her, as to the contract made with the trustees, till she obtained, or by the exercise of ordinary care might have obtained, information as to the extent and nature of her legal rights. *Ibid.*

10. The fact that the failure of the widow to take her legal rights grew out of a mistake of law does not militate against the power of equity to grant her relief, since mistakes of law upon the part of a *cestui que trust*, induced by the trustee, or such mistakes occurring between persons where analogous relations exist, are relievable in equity as readily as mistakes of fact. *Ibid.*

11. The trustees and executors, having by their wrongful treatment of the widow prevented her from forming an intent to take the provision made for her by law, are chargeable with having fraudulently prevented her from making the election necessary to secure such provision, since, had she formed such intent, she would probably have executed it. *Ibid.*

12. The principle that no man can in equity profit by his own wrong, and the principle that if a person be fraudulently prevented from doing an act it will be considered in equity, as against the party guilty of the fraud, as if the act were done, apply, precluding the trustees from profiting in their representative capacity by the enrichment of the estate by the failure of the widow to secure the provision made for her by law. *Ibid.*

13. The trustees under the will are liable to account to the widow as constructive trustees for all the property and the use thereof, which she would have come into the possession of by an election to take the provision made for her by law; and the heirs are liable to account in the same manner for all property that has been distributed to them which justly belonged to her, and their interests in the trust property still in the hands of such trustees are chargeable with their obligation in that regard. *Ibid.*

14. In the accounting by the trustees, the rents received from real property under lease at the time of the death of the testator must be treated as rents and profits of real estate in which the widow was entitled to be endowed, notwithstanding she joined with her husband in making the lease. *Ibid.*

15. In the accounting between the trustees and the widow she must account for all she has received from the estate, and the trustees, under the circumstances, should be allowed their costs and charges upon substantially the same basis as allowances are made to trustees of an express trust. *Ibid.*

Implied revocation: Marriage and adoption of child.

16. Under sec. 2290, Stats. 1898 (relating to revocation of wills and providing that nothing therein contained "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator"), marriage of the testator and birth of a child operate to revoke a will made prior to such marriage and not in contemplation thereof. *Glascott v. Bragg*, 605

17. Under sec. 4024, Stats. 1898 (providing that a duly adopted child "shall be deemed, for the purposes of inheritance and succession by such child . . . the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption"), adoption of a child is equivalent to birth of a child in its effect upon a will made prior to the marriage of the adopting parents. *Ibid.*

WITNESSES. See CLERKS OF COURTS, 5.

WORDS AND PHRASES.

Action to recover damages, where death was caused, etc., in statute. See LIMITATION OF ACTIONS.
Assumption of debts, etc., in conveyance. See RAILROADS, 8.
Bond to the county, in statute. See APPEAL, 31.
Common or general interest to many persons, in statute. See PARTIES.
Dangerous weapon, in statute. See CRIMINAL LAW, 16, 17.
Dealing, in statute. See INTOXICATING LIQUORS.
Enter into the business, etc., in by-law. See INSURANCE, 11.
Entry, in statute. See PUBLIC LANDS, 6.
Equal division, in charter. See MUNICIPAL CORPORATIONS, 2.
Fellow-servants. See MASTER AND SERVANT.
Final judgment. See APPEAL, 1, 2. MALICIOUS PROSECUTION, 4.
Franchise, in statute. See TELEPHONE COMPANIES, 2.
Grain, fruits, hops, and legumen, in statute. See INSURANCE, 5.
Highway, in statute. See TELEPHONE COMPANIES, 1.
Insolvency. See INSOLVENCY, 1.
Judgment, in statute. See APPEAL, 1, 2.
Making copies of paper or record, in statute. See CLERKS OF COURTS, 2, 7.
Ordinary care. See NEGLIGENCE, 6.
Planks twelve inches wide, in statute. See BRIDGES, 1.
Provision, in statute. See WILLS, 2.
Proximate cause. See TRIAL, 8.
Purport to be published under authority, in statute. See EVIDENCE, 4.
Real party in interest, in statute. See ACTION, 1.
Recording any paper, in statute. See CLERKS OF COURTS, 8.
Regulate the use of streets, in charter. See TELEPHONE COMPANIES, 2, 3, 6, 7.
Residence prior to confirmation, in statute. See PUBLIC LANDS, 5.
Separate property or business, in statute. See MARRIED WOMEN.
Suppress or restrain, in charter. See MUNICIPAL CORPORATIONS, 6.
Tax, in statute. See TAXATION, 2.
Trafficking, in statute. See INTOXICATING LIQUORS.

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